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# How Does the Law Put a Historical Analogy to Work?: Defining the Imposition of "A Condition Analogous to That of a Slave" in Modern Brazil

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# HOW DOES THE LAW PUT A HISTORICAL ANALOGY TO WORK?: DEFINING THE IMPOSITION OF “A CONDITION ANALOGOUS TO THAT OF A SLAVE” IN MODERN BRAZIL

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## INTRODUCTION

Over the last decades, the Brazilian state has engaged in concerted legal efforts to identify and prosecute cases of what officials refer to as “slave labor” (*trabalho escravo*).<sup>2</sup> At a conceptual level, the campaign has paired the constitutional protection of human dignity

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and the “social value of labor”<sup>3</sup> with an expansive interpretation of the offense described in Article 149 of the Criminal Code as “the reduction of a person to a condition analogous to that of a slave.”<sup>4</sup> At the operational level, mobile teams of inspectors and prosecutors have intervened in thousands of work sites, and labor prosecutors have obtained hundreds of consent agreements and convictions in the labor courts, a civil branch of the judiciary. Between the mid-1990s and the end of 2016, some 51,000 workers were administratively *resgatados* (“rescued”) from rural and urban workplaces in which inspectors determined that they had been reduced to a condition analogous to slavery.<sup>5</sup> Under the supervision of the inspectors, labor contracts have been administratively cancelled, back pay has been (when possible) extracted from the employer, and unemployment insurance payments have been provided to the rescued workers.<sup>6</sup>

Those who have supported and carried out the campaign see it as enforcing an important provision of a longstanding criminal code and expressing fundamental values enshrined in Brazil’s 1988 constitution, values that should be endorsed by all public officials.<sup>7</sup> The 1988 constitution, written as Brazil emerged from years of dictatorship

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3. CONSTITUIÇÃO FEDERAL art. I, III, IV (Braz.) [hereinafter C.F.].

4. The Penal Code was enacted by presidential decree in 1940, when Congress was closed during the period of the Estado Novo under President Getúlio Vargas. See Decreto-Lei No. 2.848, de 7 de Dezembro de 1940, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 31.12.1940, 23911 (Braz.). The current wording of Article 149 was defined by a 2003 statute. See Lei No. 10.803, de 11 de Dezembro de 2003, D.O.U. de 12.12.2003, 1 (Braz.). On related labor legislation in this period, see generally JOHN D. FRENCH, DROWNING IN LAWS: LABOR LAW AND BRAZILIAN POLITICAL CULTURE (2004).

5. DIVISÃO DE FISCALIZAÇÃO PARA A ERRADICAÇÃO DO TRABALHO ESCRAVO, RESULTADO DAS FISCALIZAÇÕES DE COMBATE AO TRABALHO ESCRAVO NO ANO DE 2016 (on file with the Duke Journal of Constitutional Law and Public Policy).

6. Two overviews of the situation are RICARDO REZENDE FIGUEIRA, ADONIA ANTUNES PRADO & HORÁCIO ARUNTUNE DE SANT’ANA JÚNIOR, TRABALHO ESCRAVO CONTEMPORÂNEO: UM DEBATE TRANSDISCIPLINAR (2011); RICARDO REZENDE FIGUEIRA, ADONIA ANTUNES PRADO & EDNA MARIA GALVÃO, PRIVAÇÃO DE LIBERDADE OU ATENTADO À DIGNIDADE: ESCRAVIDÃO CONTEMPORÂNEA (2013). Overall data on recent actions in the labor courts, but lacking specifics on the charges, are available at CONSELHO NACIONAL DE JUSTIÇA, JUSTIÇA EM NÚMEROS (2016) (Braz.), <http://www.cnj.jus.br/files/conteudo/arquivo/2016/10/b8f46be3dbbf344931a933579915488.pdf>.

7. C.F., *supra* note 3, art. I. In an open letter to candidates for the presidency in 2014, the National Commission for the Eradication of Slave Labor asked them to commit themselves to the goal of eliminating the use of slave labor, and to resign if they themselves had used such labor. See CONATRAE, *Carta Compromisso Contra o Trabalho Escravo* (Sept. 19, 2014), reproduced in “Conatrae envia a candidatos à Presidência documento contra o Trabalho Escravo,” Associação Nacional dos Magistrados da Justiça do Trabalho, <http://www.anamatra.org.br/imprensa/noticias/21867-conatrae-envia-a-candidatos-a-presidencia-documento-contra-o-trabalho-escravo>.

associated with the dominance of landowners and employers over rural and urban workers, reflects modern human rights language and the influence of a renewed labor movement, which converge on a strong commitment to the protection of human dignity.<sup>8</sup> Critics, including conservative state officials and landowners, have nonetheless attacked the modern campaign for the “eradication of slave labor” as resting on vague statutes and subjective categories.<sup>9</sup> While the critics generally endorse the idea that conditions equivalent to slave labor are impermissible, they dispute the current interpretation of Article 149 of the Penal Code, and they accuse labor inspectors and prosecutors of subjective interpretations of phrases like “degrading conditions of labor.”<sup>10</sup> For many of the critics, the term “slave labor” should be restricted to cases of “absolute subjection,” corresponding to their image of colonial and nineteenth-century slavery.<sup>11</sup> They generally seek to limit the modern application of the term to circumstances of complete control of workers, those characterized by restrictions on physical movement imposed by force.<sup>12</sup>

In this Article, we ask whether the values that underlie the campaign have over time interacted with everyday practice to generate standards that meet the requirements of precision and predictability appropriate to law, whether for the civil cases before the

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8. On the context for the writing of the constitution, see Cristiano Paixão, *Direito, política, autoritarismo e democracia no Brasil: da Revolução de 30 à promulgação da Constituição da República de 1988*, 26 REVISTA IBEROAMERICANA DE FILOSOFIA, POLÍTICA Y HUMANIDADES, 146, 164–65 (2011).

9. A classic statement of this hostility is the opinion expressed by the Supreme Court Justice Gilmar Mendes:

Indeed, the primary criminal rule written in Article 149 contains indeterminate clauses – such as ‘degrading labor conditions’– that can be applied in an unwarranted way, allowing courts to go well beyond the factual circumstances actually referred to in the norm and thus encompass each and every case in which workers are submitted to labor conditions deemed to be humiliating [*indignas*].

S.T.F., R.E. No. 398.041, Relator: Min. Joaquim Barbosa, R.T.J. 209/2, 869, 897 (Braz.).

10. *Id.*

11. On the history of acts of enslavement in the nineteenth century, see Beatriz G. Mamigonian & Keila Grinberg, *Le crime de réduction à l’esclavage d’une personne libre (Brésil, XIXe siècle)*, 11 BRÉSIL/S (2017).

12. For discussion of critics’ efforts to alter the legal language, see *infra* Epilogue. See also Mariana Armond Dias Paes, *O Crime de “Redução à Condição Análoga à de Escravo” em dados: Análise dos Acórdãos do Tribunal Regional Federal da 1ª Região*, in DISCUSSÕES CONTEMPORÂNEAS SOBRE TRABALHO ESCRAVO: TEORIA E PESQUISA 81 (R. R. Figueira et al. eds., 2016); Mariana Armond Dias Paes, *L’histoire devant les tribunaux: la notion d’esclavage contemporain dans les décisions judiciaires brésiliennes*, 11 BRÉSIL/S (2017); Leonardo Augusto de Andrade Barbosa, *Enjeux de la définition juridique de l’esclavage contemporain au Brésil: liberté, dignité et droits constitutionnels*, 11 BRÉSIL/S (2017).

labor courts, or for the criminal cases before the federal courts. We find that as they have gathered and analyzed information on individual cases, the inspectors, labor prosecutors, and labor judges have engaged in a kind of active normative learning (and teaching). In the process, they have given the value-laden term “slave labor” more definite criteria of application, as befits a process of law enforcement.<sup>13</sup> Moreover, the administrative side of the campaign, in conjunction with the labor courts, has served as a demonstration that “slave labor” can be seen, named, and prosecuted by professionals who are agents of the state, thus giving legal expression to the core values themselves.

The inspection reports, with their emphasis on the importance of eliminating “degrading conditions,” have also given specificity and visibility to one of the dimensions of the constitutional protection of human dignity. In its overall jurisprudence, the Brazilian Supreme Court (the Supreme Federal Tribunal, or STF) has come to interpret the constitutional guarantee of “human dignity” as a foundational “meta-principle.”<sup>14</sup> Scholar and current Justice of the Supreme Federal Tribunal Luis Roberto Barroso has argued that “human dignity” operates as a core legal principle in the Brazilian constitution and elsewhere, playing two main roles.<sup>15</sup> First, it is “a source of rights—and, consequently, duties—including non-enumerated rights that are recognized as part of a mature democratic society.”<sup>16</sup> Second, as an interpretive principle, “Human dignity is part of the core content of fundamental rights, such as equality, freedom, or privacy. Therefore, it necessarily informs the interpretation of such constitutional rights, helping to define their meaning in particular cases.”<sup>17</sup> We find that the concept of dignity has in fact reached the day-to-day reports of labor inspectors, and has informed their efforts to separate routine regulatory violations from the presence of degradation signaling what the law refers to as “a condition analogous to that of a slave.”<sup>18</sup>

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13. For a discussion of the cognate concept of “moral learning,” see Peter Railton, *Moral learning: Conceptual foundations and normative relevance*, 167 COGNITION 172 (Oct. 2017).

14. See S.T.F. Recurso Extraordinário n. 898.060/SC, Relator: Min. Luiz Fux, 38, 21.09.2016, D.J.e., 24.08.2017.

15. See Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT’L & COMP. L. REV. 331, 356 (2012).

16. *Id.*

17. *Id.*

18. Lei No. 10.803, de 11 de Dezembro de 2003, D.O.U. de 12.12.2003, 1.

The Brazilian framework thus contrasts with the constitutional order of the post-Civil War United States, in which a trio of Reconstruction amendments reshaped but did not overturn a structure dating to the late eighteenth century. Brazil and the United States share a history of the large-scale enslavement of persons of African descent, and a legacy of unequal labor and social relations emerging from long-delayed abolition. Operating within different legal traditions, courts in both countries have acknowledged the existence of labor relations analogous to chattel slavery, and confirmed the constitutional warrant for legislation that prohibits (and criminalizes) the imposition of such relations. In an important decision issued in 1981, for example, upholding a conviction under legislation passed in 1866 and modified in 1948, the U.S. Fourth Circuit Court of Appeals wrote that “the thirteenth amendment applied not only to state-sanctioned slavery but to slavery practiced by individuals.”<sup>19</sup> Thus more than a century after the elimination of state recognition of property rights in persons, courts could properly convict three men from North Carolina of “kidnapping and carrying away two persons with the intent to hold them as slaves in violation of 18 U.S.C. §§ 1583 and 2 (1976).”<sup>20</sup> Such language is rarely used by U.S. courts, however, and there is no national campaign framed around the identification and elimination of “debilitating work days” or “degrading conditions.”<sup>21</sup>

By contrast, Brazilian government agencies involved in the national campaign against slave labor release regular statistics on the number of inspections, the number of workers rescued, and the infractions cited. The Catholic Pastoral Land Commission (CPT) and other civil society organizations, whose efforts were crucial in the genesis of the official campaign, continue to gather witness testimony and convey formal denunciations to the press and to government bodies. Building on these data, scholars have been able to analyze and

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19. See *United States v. Booker*, 655 F.2d 562, 564 (4th Cir. 1981).

20. *Id.* at 563. For details on the recent legislative history of 18 U.S.C. § 1583, sometimes described as the crime of “enticement into slavery,” see U.S. GOV’T PUBLISHING OFFICE, 18 U.S.C. 1583 ENTICEMENT INTO SLAVERY 380 (2011). For the original bill, to which modern legislation can be traced, see Civil Rights Bill of 1866, 14 Stat. 50.

21. On the complexities of legislation and enforcement on modern slavery, and in the cognate area of human trafficking, see BRIDGETTE CARR, ANNE MILGRAM, KATHLEEN KIM & STEPHEN WARNATH, EDS., *HUMAN TRAFFICKING LAW AND POLICY* (2014).

map the regional distribution of conditions identified as slave labor and the correlates of their incidence.<sup>22</sup>

The sheer volume of the evidence gathered by the inspection teams – evidence that is used both by the labor courts and by the criminal courts – conveys the seriousness of Brazil’s engagement with the problem. Criminal prosecution and conviction of violators, however, has lagged far behind the identification of civil infractions, raising the question of whether effective deterrence and punishment are in fact being provided. Brazil thus faces a seemingly contradictory situation, in which its campaign of inspection and labor prosecution has accomplished a great deal over the past twenty years, while the country has recently been condemned by the Inter-American Court of Human Rights for the lack of effective criminal enforcement in precisely this area.<sup>23</sup>

### I. DISCERNING AND DOCUMENTING THE OFFENSE

So how do inspectors and prosecutors translate into practice the identification of an offense whose definition rests on the concept of a modern analogy to an ancient institution? Doing so requires closing the gap between the moral opprobrium (and normative judgment) associated with the strong term “slave labor” and the circumstances found on individual work sites. The analogy with slavery, in effect, has to be turned into a legal and descriptive tool, its content made manifest in the observable conditions to be found in the world of work.<sup>24</sup>

To defend a diagnosis of a “condition analogous to that of a slave,” inspectors need to build up a chain of evidence and

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22. See HERVÉ THÉRY, NELI APARECIDA DE MELLO, JULIO HATO & EDUARDO PAULON GIRARDI, *ATLAS DO TRABALHO ESCRAVO NO BRASIL* 11 (2009), <http://amazonia.org.br/wp-content/uploads/2012/05/Atlas-do-Trabalho-Escravo.pdf> (“This Atlas of Slave Labor in Brazil charts, for the first time, the flows, modalities, and uses of slave labor in the country, at the municipal, state, and regional levels, based on consolidated official sources. It also points out the most frequent phenomena associated with slave labor, such as deforestation. Apart from the unprecedented diagnosis, the Atlas provides Brazilian society with two new tools: the Index of Probability of Slave Labor and the Index of Vulnerability to Recruitment to Slave Labor.”).

23. The longstanding case of Fazenda Brasil Verde, see *infra* Epilogue, yielded a decision of the Inter-American Court of Human Rights in October 2016. See *Caso Trabajadores de la Hacienda Brasil Verde vs. Brasil*, Sentencia de 20 Octubre de 2016, Inter-Am. Ct. H.R. (Oct. 20, 2016), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_318\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_318_esp.pdf).

24. For a recent set of essays addressing the rhetorical and analytic use of analogies with slavery, see the forum titled ‘*A Crime Against Humanity*’: *Slavery and The Boundaries of Legality, Past and Present*, 35 *LAW & HIST. REV.* 1 (2017).

interpretation to link workplace conditions and practices to the normative—and powerfully stigmatizing—conclusion. Thus to explore the analytic processes in which agents of the state have been engaged as they decide whether the conditions they observe should be characterized as “slave labor” requires examining the intermediate steps that leave their traces in the prose and photographs contained in the official *relatórios* (reports), thousands of which have been archived and digitized. These rich case files reveal the specific conditions that have led inspectors and prosecutors to draw the analogy with slavery. They also suggest some of the feedback that characterizes this kind of dialogue, as the language of observation and the language of justification become intertwined and modified over time.<sup>25</sup>

A relatively routine example conveys the general shape of such inspections and the responses to them, by way of background for the analysis that follows. On July 25, 2008, a worker on the coffee farm Sítio Bom Jesus in the state of Minas Gerais sought to leave the farm but was blocked from retrieving his belongings from the barracks.<sup>26</sup> He reported the incident to an official of the Union of Rural Workers in a nearby town.<sup>27</sup> A union representative accompanied the worker back to the farm, but was himself attacked by the coffee farmer.<sup>28</sup> (The employer later claimed to have mistaken the union representative for a thief.<sup>29</sup>) The union then contacted the Ministry of Labor and Employment.<sup>30</sup>

A “mobile team” of three labor inspectors, one labor prosecutor, and two police officers was assembled, and traveled to the farm the next day.<sup>31</sup> When they arrived, the employer told them that he did not know whether the workers were still on the farm.<sup>32</sup> Searching the area, the team found two groups of workers in rough barracks.<sup>33</sup> Inspectors

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25. We express our great thanks to officials in the Division for Inspection for the Eradication of Slave Labor (DETRAE) of the Ministry of Labor and Social Security (formerly MTE, now MTPS) for graciously facilitating our access to digital copies of the comprehensive collection of MTPS inspection reports (*Relatórios Fiscais*), which are public documents.

26. See Ministério do Trabalho e Previdência Social, *Relatório Fiscal*, Sítio Bom Jesus, at 8.) *Das Providências Adotadas Pela Fiscalização* [hereinafter MTPS RF].

27. See *id.*

28. See *id.*

29. See *id.*

30. See *id.*

31. See *id.*

32. See *id.*

33. See *id.*



learned that they had migrated from the state of Bahia looking for work, were unregistered as employees of the farm, were not accorded any of the required days of rest, and had not been paid regularly.<sup>34</sup> The inspectors then took formal depositions and photographed the conditions of the barracks, in particular noting the lack of hygienic facilities, the storage of “agrotoxics” in the kitchen area, the poor condition of the accommodations, and the lack of adequate beds.<sup>35</sup>

The team concluded that there was an immediate risk to the health and safety of the workers, and ordered the barracks condemned and the workers removed from the farm.<sup>36</sup> The workers—16 in all—were lodged in a hotel in town while preparations were made for their (unwritten) work contracts to be formally cancelled, with the payment of wages due. Two days later, the employer alleged that he did not have enough money to pay the workers. After negotiation, an arrangement was made for the employer to provide each worker with a portion of the calculated back pay; workers also received the designated unemployment payments due from the state to help them bridge over to their next job.<sup>37</sup>

In the final written report, the workers were said by the inspectors to have been laboring in a condition “analogous to that of a slave.”<sup>38</sup> The employer was not offering workers the basic elements required by an employment relation: He subjected them to “degrading conditions,” lodged them in a setting inappropriate for human habitation, failed to enter the terms of employment on each worker’s labor booklet as required by law, failed to register them for labor benefits, retained their wages, and failed to provide them with the required days of rest.<sup>39</sup> Constraint could be seen in the threats made against the worker who had tried to quit, and in the failure to pay wages regularly, such that anyone who did leave would forfeit payment for weeks of work.<sup>40</sup>

Reading the file, one senses that this employer had done just about everything that might predispose the inspectors and

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34. *See id.*

35. *See id.* at 7.4.) Das irregularidades na área de medicina e segurança no trabalho, 8.) Das Providências Adotadas Pela Fiscalização, 9.) Autos de Infração Lavrados.

36. *See id.* at 8.) Das Providências Adotadas Pela Fiscalização.

37. *See id.* at 10.) Conclusão.

38. *See id.* at 8.) Das Providências Adotadas Pela Fiscalização.

39. *See id.*

40. *See id.* at 8.) Das Providências Adotadas Pela Fiscalização, 9.) Autos de Infração Lavrados, 10.) Conclusão.

prosecutors to seek to have him punished. Not only did he provide terrible conditions of lodging and retaliate against the worker who had initially sought to leave, but he physically attacked the union representative, lied to the inspectors, and came up short when he was called upon to pay the wages due.

Alongside a proceeding in the labor courts, which yielded a settlement,<sup>41</sup> this inspection led to a rare criminal prosecution and trial for a violation of Article 149 of the Brazilian Penal Code. The judge in the federal criminal court, however, stated that the right protected by Article 149 was the individual right to freedom of movement.<sup>42</sup> He concluded based on testimony provided by the witnesses that at no time were the workers actually *forced* to work for the defendant. Indeed some of them had worked on the farm before.<sup>43</sup> He thus deemed evidence of degrading working conditions and retention of pay insufficient to prove the criminal charge.<sup>44</sup>

The operator of Sítio Bom Jesus seems to have been a nearly cinematic bad guy, albeit a poor renter rather than a rich owner. He was perennially short of cash. Inspectors could denounce him, prosecutors could throw the book at him, and a labor court judge could convict him, without fear of political retaliation. But even in this instance, prosecutors could not make the criminal charges stick.<sup>45</sup>

#### A. *The context*

Article 149 of the Brazilian Penal Code, as amended in 2003, makes it a crime “to *reduce* a person to a condition analogous to that of a slave” either by *subjecting* him/her to forced labor or debilitating workdays; by *subjecting* him/her to degrading working conditions; or by *restricting*, by any means, his or her movement by reason of debt

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41. See Tribunal Regional do Trabalho da 3a Região, Justiça do Trabalho de 1º grau em Minas Gerais, 1a Vara do Trabalho em Alfenas, Ação Trabalhista n. 0117500-39.2008.5.03.0086, Judge Frederico Leopoldo Pereira.

42. Tribunal Regional Federal da 1a Região, Justiça Federal de 1º grau em Minas Gerais, 1a Vara Federal de Varginha, Ação Penal n. 2009.38.09.001228-7, Judge Sérgio Santos Melo, e-DJF1 24/03/2014.

43. *Id.*

44. *Id.*

45. Based on the experience of one of the authors, we observe that in such circumstances criminal court judges may sometimes be reluctant to convict defendants who are themselves poor farmers, given that the resulting incarceration or payment of fines might leave family members utterly without resources. On the application of criminal penalties, see Carlos H. B. Haddad, *The Definition of Slave Labor for Criminal Enforcement and the Experience of Adjudication*, MICHIGAN J. INT’L L. (forthcoming 2017).

contracted with the employer or his/her agent.<sup>46</sup> The verbs used in the language of the code—*reduzir*, *submeter*, *sujeitar*, and *restringir* (to reduce, to submit, to subject, and to restrict)—imply constraint, to which, for the purposes of criminal prosecution, intent would be added. Requiring evidence of constraint is not the same thing, of course, as insisting that the worker must be shown to be physically unable to leave the workplace. But it does raise the question of the relationship between observable bad conditions of work, on the one hand, and a finding that such conditions have been imposed in circumstances that constitute a legally relevant form of domination or subjection, on the other.

As they face this challenge, the inspectors have found themselves operating within a political context in which the issue of characterizing some labor relations as *trabalho escravo*, slave labor, is increasingly volatile.<sup>47</sup> Civil society activists, aiming to strengthen the hand of the state when confronted with employers who might simply factor potential fines and settlements into the costs of production, long sought the passage of a constitutional amendment that would raise the penalties by mandating the expropriation (without compensation) of land on which slave labor was employed. Large-scale landowners resolutely opposed this step.<sup>48</sup> In June of 2014, the proposed amendment nonetheless passed the Congress, a step that was followed by celebration.<sup>49</sup> That passage had been obtained, however, by a bargain under which a full *regulamento* (set of regulations) governing its enforcement, developed in dialogue with all stakeholders, would soon follow.<sup>50</sup> As of this writing, however, that set

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46. See Lei No. 10.803, de 11 de Dezembro de 2003, D.O.U. de 12.12.2003, 1 (Braz.) (emphasis added) (“Art. 149. Reduzir alguém a condição análoga à de escravo, quer submetendo-o a trabalhos forçados ou a jornada exaustiva, quer sujeitando-o a condições degradantes de trabalho, quer restringindo, por qualquer meio, sua locomoção em razão de dívida contraída com o empregador ou preposto . . .”). Prior to its alteration, Article 149 of the Penal Code simply held that it was a crime to reduce a person to a condition analogous to that of a slave. The 2003 reform added a more detailed account of which actions should be deemed to fit the description of the crime, particularly by clarifying that the subjection of the worker to degrading labor conditions or to debilitating workdays - even in the absence of a curtailment to the worker’s freedom of movement - suffices for the commission of the felony.

47. See discussion below. See also *infra* Epilogue.

48. To follow the progress of this lengthy campaign through the archives of an activist website, see *Tag: Trabalho Escravo*, Repórter Brasil, <http://reporterbrasil.org.br/tags/trabalho-escravo/> (last visited Sept. 24, 2017).

49. *Id.*

50. The amendment was inserted into Article 243 of the Constitution, alongside an earlier provision for expropriation of land on which illegal drugs, including marijuana, had been cultivated. Emenda Constitucional No. 81, de 5 de junho de 2014, D.O.U. de 06.06.2014 (Braz.).

of regulations has not been issued and it appears that no expropriations have been initiated.<sup>51</sup> The terms under which the new amendment will be enforced, moreover, have become a lightning rod for criticism of the larger pattern of enforcement.<sup>52</sup>

Large-scale landowners and their allies have been quick to push back, both in the regulatory drafting process and by proposing new statutory language to replace the existing language in the Penal Code. Taking their cue from an earlier dissent filed by Supreme Court Justice Gilmar Mendes, conservative representatives have again argued that the specific provisions of the relevant article of the Brazilian Penal Code, as amended in 2003, which have also served indirectly as guidelines for the labor prosecutors and labor courts, are subjective and inappropriate. In Mendes's view, "supposed degrading conditions" should not be taken as evidence of reduction to a condition analogous to that of a slave unless there has been a direct blocking of the workers' capacity to leave the work site.<sup>53</sup>

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Given the operation of the prior amendment, it is not clear that it was indispensable for specific regulations to be in place before the new amendment could be enforced, but prosecutors and members of the legislature have nonetheless awaited the regulations. As of the date of this writing (September 2017), a bill containing draft regulations remains under consideration in the federal Senate. See Projeto de Lei No. 432, de 2013, DIÁRIO DO SENADO FEDERAL [D.S.F.] de 19.10.2013.

51. For a 2015 administrative decision that appears to block any potential expropriations for the time being, see *AGU suspende desapropriação pelo Incra de terra com trabalho escravo*, GLOBO (Braz.) (Sep. 4, 2015), <http://g1.globo.com/politica/noticia/2015/09/agu-suspende-desapropriacao-pelo-incra-de-terra-com-trabalho-escravo.html>.

52. For examples of press coverage of the controversies around the amendment, see *Congresso promulga emenda do trabalho escravo*, FOLHA DE SÃO PAULO (Braz.) (June 5, 2014), <http://www1.folha.uol.com.br/mercado/2014/06/1465532-congresso-promulga-pec-do-trabalho-escravo.shtml>; *Divergências atrasam efetivação de emenda constitucional do trabalho escravo*, GLOBO: REVISTA PEQUENAS EMPRESAS E GRANDES NEGÓCIOS (Braz.) (May 13, 2017), <http://revistapegn.globo.com/Noticias/noticia/2017/05/divergencias-atrasam-efetivacao-de-emenda-constitucional-do-trabalho-escravo.html>.

53. See Gilmar Mendes, Supremo Tribunal Federal, Inquérito n. 2131, 46 23/02/2012 ("If the victim was given the freedom to quit the job, rejecting the supposed degrading conditions, it is not reasonable to conceive of this as the crime of reducing the worker to a condition analogous to that of a slave."). See also Katia Abreu, a large landowner who is a senator, in Diário do Senado Federal 326–27, 16 de julho de 2014 ("Slave labor is defined by the ILO—International Labor Organization—in the 1930 Forced Labor Convention. Article 2 of the Convention establishes that slave labor, anywhere—not just in farms or industry, but everywhere in this country and in the world—is a practice by which one restricts the worker's freedom of movement; by which one forces a citizen, an honest worker, to toil without payment; by which one usurps rights, and imprisons a worker because of a debt contracted with the employer's canteen. All these are forms to curtail the freedom of movement, the citizen's freedom of choice. We repudiate this, we are against it; by the way, any citizen is. As a woman, as a mother, as a grandmother, as Senator of the Republic, I reject these practices. And there must be very few people in Brazil who do not, because here, in this country, we are good faith Brazilians, we know the law, and we practice one of the largest and best agricultures on Earth,

Employers at times seek to argue that the consent implied by accepting a job and staying at work expresses the worker's free will, and thus absolves the employer of the charge of having *imposed* whatever length of the work day or conditions of labor may have been uncovered. Such reasoning has long been rejected in international law on slavery and human trafficking, however, because of increasing awareness of the vulnerability that may lie behind recruitment, and the psychological forces or surrounding circumstances of conflict that may compel obedience.<sup>54</sup> Guidelines used within Brazil's National Coordinating Group on the Elimination of Slave Labor (CONAETE), moreover, recognize that in certain situations of domination the question of consent/free will may be rendered legally "irrelevant."<sup>55</sup>

The Coordinating Group's instructions to prosecutors provide explications of the meaning of the key phrases in the law – "debilitating work day" and "degrading working conditions." They thus suggest how the language from Article 149 of the criminal code is to be interpreted for the purpose of civil prosecution in the labor courts:

Guideline N. 03: A debilitating workday is one which, due to intensity, frequency, physical strain, or other circumstances causes harm to the physical or mental health of the worker, violating his/her dignity, and results from a situation of subjection that for any reason renders his/her own will irrelevant.

Guideline N. 04: Degrading working conditions are those that show disrespect for human dignity by failing to comply with the fundamental rights of the worker, especially those regarding hygiene, health, security, housing, rest, and food, or those related to the rights of personhood, and result from a situation of subjection that for any reason renders the worker's own will irrelevant.<sup>56</sup>

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envied by the entire world. It is not possible that such an advanced business, one that uses technology, will enslave its workers . . .").

54. For discussions by several authors of the term "slavery" in international law, *see generally* JEAN ALLAIN, *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* (2012). *See, e.g.*, ICTY, Appeals Chamber, Kunarac et al., 12 June 2002, paragraph 120 ("[L]ack of consent does not have to be proven by the Prosecutor as an element of the crime [of enslavement].")

55. We received copies of the guidelines in an E-mail from Tiago Muniz Cavalcanti, National Coordinator of CONAETE, to Leonardo Barbosa (Aug. 12, 2017, 16:01 EST) (on file with authors). The guidelines may be made available on the public website of CONAETE or the MPT shortly.

56. The guidelines in original Portuguese are below:

Orientação N. 03: Jornada de trabalho exaustiva é a que, por circunstâncias de

These invocations of a “situation of subjection” that renders the worker’s free will or consent “irrelevant” can be seen as offering a conceptual parallel to recent discussions of rape during wartime or as part of campaigns of genocide, in which concepts of individual consent or lack of consent drawn from common-law understandings of the crime of rape are quite inappropriate.<sup>57</sup> One difference, however, lies in the level at which the “situation of subjection” is envisioned to operate. The coercion that characterizes slave labor in Brazil is not a far-reaching campaign of wartime hatred or genocidal malice, but rather a pattern in which employers build on and deepen the vulnerability of a portion of the working population in order to facilitate control.<sup>58</sup> It thus needs to be demonstrated not through a characterization of the entire national situation of income inequality, and much less by a one-by-one examination of each worker’s consent or lack of consent, but rather through an examination of the enterprise-wide or industry-wide circumstances of recruitment, and then the site-specific daily regime of labor, with particular attention to elements that may have engendered a fear of violence or retaliation.<sup>59</sup>

In this light, the wording of the Coordinating Group’s guidelines becomes clearer. True, they explicate one pair of normative terms

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intensidade, frequência, desgaste ou outras, cause prejuízos à saúde física ou mental do trabalhador, agredindo sua dignidade, e decorra de situação de sujeição que, por qualquer razão, torne irrelevante a sua vontade.

Orientação N. 04: Condições degradantes de trabalho são as que configuram desprezo à dignidade da pessoa humana, pelo descumprimento dos direitos fundamentais do trabalhador, em especial os referentes a higiene, saúde, segurança, moradia, repouso, alimentação ou outros relacionados a direitos da personalidade, decorrentes de situação de sujeição que, por qualquer razão, torne irrelevante a vontade do trabalhador.

*Id.* See also Cartilha do trabalho escravo, MINISTÉRIO PÚBLICO DO TRABALHO, [http://portal.mpt.mp.br/wps/wcm/connect/portal\\_mpt/11344af7-b9d7-4fcc-8ebe-8e56b5905129/Cartilha%2BAAlterada\\_3-1.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=11344af7-b9d7-4fcc-8ebe-8e56b5905129](http://portal.mpt.mp.br/wps/wcm/connect/portal_mpt/11344af7-b9d7-4fcc-8ebe-8e56b5905129/Cartilha%2BAAlterada_3-1.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=11344af7-b9d7-4fcc-8ebe-8e56b5905129) (last visited Oct. 28, 2017).

57. The United Nations International Criminal Tribunal for Rwanda addressed this question and observed that “coercion is an element that may obviate the relevance of consent in the crime of rape.” See *Prosecutor v. Muhimana*, Case No. ICTR 95-IB-T, Judgment, ¶ 546 (Int’l Crim. Trib. for Rwanda Apr. 25, 2005). On the question of consent, see also Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT’L L. 940 (2006).

58. See Barbosa, *supra* note 12 (exploring the concept of an intentional deepening of vulnerability).

59. See generally Ricardo Rezende Figueira, Adonia Antunes Prado & Rafael Franca Palmeira, *L’esclavage contemporain et ses transformations en Amazonie brésilienne: les témoignages des victimes*, 11 BRÉSIL/S (2017) (analyzing the element of fear in cases of slave labor in Brazil).

(debilitating work day and degrading conditions of labor) by reference to an additional un-explicated normative term (a “situation of subjection”). But this is not in practice a fatal circularity. First of all, it is hardly surprising that explicating a normative term requires reference to other normative terms. To expect norms to be purely reducible to observables would be unreasonable. But more important, this double framing reflects the fact that the details of the specific conditions and circumstances uncovered during inspections will themselves be closely related to uncovering the factors of humiliation, fear, or threat that may create a situation that can be described as one of subjection. The descriptive portions of each guideline—including the references to physical exhaustion and to specific violations of workers’ enumerated rights—are thus intertwined with the closing references to “a situation of subjection” that renders the worker’s free will “irrelevant.” It is up to the inspectors both to discern the particulars of the offense, and to determine whether the immediate context meets an appropriate understanding of the concept of “subjection.”

The definitional disputes that have long roiled international debates over the appropriateness of the term “slavery”<sup>60</sup> are in the process somewhat mitigated. What is being identified is not a status or condition called “slave.” It is instead a form of extraction of work called “slave labor.” In identifying that form of extraction, one needs to look both at the labor itself, and at the context within which it was extracted from workers. It is the totality of the circumstances of that labor (which may include physical debilitation and risks to life and health) along with some things external to the workplace itself (such as the distance between the place of potentially deceptive recruitment and the place of labor) that will shape the diagnosis of the presence of “subjection.” In practice, moreover, physical exhaustion and risk have often been compounded by the moral humiliation of having signed up for something that proves to be a torment that yields no significant earnings after all.<sup>61</sup>

With this understanding of the task that faces the inspectors and

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60. On such debates, see ALLAIN, *supra* note 54. See also VLADISLAVA STOYANOVA, HUMAN TRAFFICKING AND SLAVERY RECONSIDERED: CONCEPTUAL LIMITS AND STATES’ POSITIVE OBLIGATIONS IN EUROPEAN LAW 292–318 (2017).

61. See generally RICARDO REZENDE FIGUEIRA, *PISANDO FORA DA PRÓPRIA SOMBRA: A ESCRAVIDÃO POR DÍVIDA NO BRASIL CONTEMPORÂNEO* (2004) (a pioneering analysis of the moral weight of debt); see also Haddad, *supra* note 45.

prosecutors, we now turn to the inspection reports themselves.

### *B. The creation of the archive*

These case files constitute a rich contemporary archive, a vast body of reports of inspections carried out by mobile teams, generally including *auditores-fiscais do trabalho* (labor inspectors) from what is now the Ministry of Labor and Social Security, accompanied by *procuradores do trabalho* (state attorneys/ prosecutors) from the Public Ministry of Labor. (The Public Ministry of Labor is an executive office independent of the regular judiciary, whose task is to bring cases to the labor courts.) We have focused our attention on Minas Gerais, a large and geographically varied state bordering on the northeastern state of Bahia. The files from Minas encompass urban and rural work sites, including sugar cane plantations and charcoal burning operations, two classic locales for the use of *trabalho escravo*.<sup>62</sup>

Inspectors from the Ministry of Labor (MTPS) are authorized to identify specific infractions, issue citations (*autos de infração*), impose fines, and, in urgent cases, authorize the cancellation of labor contracts on the spot and the removal of the workers from the work site. Attorneys from the Public Ministry of Labor (MPT) may then choose to prosecute or to encourage consensual settlements. The coordinated campaign against slave labor, however, goes beyond the regulatory responsibilities that are the ordinary work of each of these actors. The fact that the national campaign against slave labor draws on a particular construct of human dignity gives constitutional force and weight to what would otherwise be primarily a branch of labor law.<sup>63</sup>

Our reading of the inspection reports from the state of Minas Gerais suggests that the concept of dignity, although it does not appear in the statute, has over time come to inform the terms in which inspectors themselves frame these *relatórios*. The imposition of conditions that threaten the safety and health of the worker, for example, can be presented as evidence that the worker has been treated “as a thing” rather than “as a person.” Added to this are the

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62. See *infra* Note on Sources.

63. See *supra* Introduction; Barbosa, *supra* note 12. See also Rebecca J. Scott, *Dignité/Dignidade: Organizing Against Threats to Dignity in Societies After Slavery*, in UNDERSTANDING HUMAN DIGNITY 192 (Christopher McCrudden ed., 2013); and LÍVIA MENDES MOREIRA MIRAGLIA, *TRABALHO ESCRAVO CONTEMPORÂNEO: CONCEITUAÇÃO À LUZ DO PRINCÍPIO DA DIGNIDADE DA PESSOA HUMANA* (2d ed. 2015).



details of those threats to health and safety, which may include conditions equivalent to, or worse than, those of the farm animals on the same property, again signaling indignity: the provision of dirty water from an animal trough, the insistence that workers sleep on the ground and relieve themselves in the fields, or the relegation of workers to a barracks in which they cannot even stand up.<sup>64</sup>

Such conditions are framed by inspectors as more than simply evidence of an effort by employers to reduce costs, though they are also that. These indignities increase the workers' vulnerability to a point of humiliation, which may make it more difficult for them to resist or object to the work expected of them.<sup>65</sup> One journalistic account of such inspection visits quotes a worker as having blurted out to the inspectors, after describing the moldy bread provided as food, "A gente não é cachorro" ("We are not dogs").<sup>66</sup> In an interview carried out by historians, another man phrased his appreciation for the original passage of labor laws in similar terms: "... antes de 1930, não tinha lei não. O povo, a gente era bicho." ("... before 1930, there wasn't any law. Ordinary people were [considered] animals.").<sup>67</sup>

The inspectors' double-consciousness, of the importance of recording the objective conditions of work and of interpreting the dignitary offense that may be contained within those conditions, gives

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64. See, e.g., MTPS, RF, Fazenda Santa Helena (2016), archived as Op. 066/2016 (recognizing degrading working conditions based on the lack of adequate drinking water in the workplace, absence of sanitary facilities, absence of adequate food preparation facilities for workers, unavailability of containers for storing and preserving meals under hygienic conditions, and the existence of electrical installations subject to electric shock); MTPS, RF, Fazenda das Palmeiras (2016), archived as Op. 120/2016 (recognizing degrading working conditions based on, among others, the fact that the employer did not provide individual protection equipment, such as safety shoes, protective glasses, gloves, safety helmets, sunscreen or ear protectors; electrical installations with risk of electric shock in the rooms; and the employer stored gasoline inside the housing); MTPS, RF, Tapuira Comércio de Energia SPE (2015), archived as Op. 108/2015 (recognizing degrading working conditions based on the conditions of the sanitary and food facilities, the lack of structure of the construction site, and the risks to which the workers were exposed, especially in relation to the handling of explosives); MTPS, RF, Odir Brandelero e outro (2014), archived as Op. 146/2014 (recognizing degrading working conditions based on, among others, housing without adequate sanitary conditions; lack of training for safe operation of chainsaws, and chainsaws without mandatory safety devices).

65. For an example of a 2008 case in which the inspection report evoked the concept of human dignity in such circumstances, though without the word itself, see MTPS, RF, Fazenda Santa Mônica (2008), archived as Op. 46/2008, in which they refer to an "ambiente totalmente impróprio ao ser humano" (a setting altogether inappropriate for a human being).

66. KLESTER CAVALCANTI, *A DAMA DA LIBERDADE: A HISTÓRIA DE MARINALVA DANTAS, A MULHER QUE LIBERTOU 2.354 TRABALHADORES ESCRAVOS NO BRASIL, EM PLENO SÉCULO 21* (2015).

67. See ANGELA DE CASTRO GOMES, *MINISTÉRIO DO TRABALHO: UMA HISTÓRIA VIVIDA E CONTADA* 100 (2007).

the *relatórios* a particularly dramatic quality as evidence, which also reflects the drama of the inspections themselves. The mobile teams generally respond to a credible initial report from a union, a journalist, or an individual by arranging surprise inspection visits, accompanied by members of the Federal Police. (Police protection has proven to be essential. In 2004, three inspectors and a driver on another assignment were assassinated in an ambush carried out in northeastern Minas Gerais.<sup>68</sup>) In addition to the literal arms of the Federal Police, the teams are also armed with still and video cameras, walkie-talkies, forms to fill out, and Labor Cards to provide to unregistered workers.<sup>69</sup> They try to arrive without warning and move quickly onto the property, with the police closing off exit routes, and sometimes cutting off communications between units of the enterprise. The inspectors work fast in order to identify conditions that may be deemed to be *in flagrante*, and to prevent the destruction of evidence. If they believe the conditions of labor pose an immediate risk to health and safety, they can proceed directly to a *resgate*, a rescue, removing the workers from the workplace altogether and arranging their lodging in hotels nearby.<sup>70</sup>

After the initial administrative action on site, the state attorneys may propose a consent agreement, or take the case to trial in the labor courts (Justiça do Trabalho). Substantial monetary penalties can be imposed, including punitive amounts paid to the state for what are called “collective moral damages.”<sup>71</sup> Once a formal prosecution in the

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68. For details on the ambush and the criminal trial, in which the defendants were found guilty, see Tribunal Regional Federal da 1ª Região, Justiça Federal de 1º grau em Minas Gerais, 9ª Vara Criminal, Ação Penal n. 2004.38.00.036647-4, Judge Murilo Fernandes de Almeida, presiding. The decision is currently pending appeal before the Federal Regional Court for the First Circuit.

69. We are using the term Labor Card to refer to what is now called the Carteira de Trabalho e Previdência Social, a booklet-sized document issued by the Ministry of Labor and used to record an individual’s work history. Use of the Carteira is now obligatory for anyone employing a worker. See MINISTÉRIO DO TRABALHO, CARTEIRA DE TRABALHO E PREVIDÊNCIA SOCIAL.

70. Several films and videos aim to capture this drama, including those titled “Frente de trabalho” [Work Front], “Aprisionados por Promessas - a escravidão contemporânea no campo brasileiro” [Imprisoned by Promises – Contemporary Slavery in the Brazilian Countryside], and “Correntes” [Currents], generally available for viewing on YouTube, linked through the website of the activist group Repórter Brasil. See Repórter Brasil, *Frente de Trabalho*, YOUTUBE (May 14, 2012), [https://youtu.be/BB\\_ydYO\\_SPc](https://youtu.be/BB_ydYO_SPc); Repórter Brasil, *Aprisionados por Promessas*, YOUTUBE (Feb. 27, 2007), <https://youtu.be/bjgMzAUbEn8>; “Correntes” ganha prêmio de público na Mostra Cine Trabalho, REPÓRTER BRASIL (Nov. 23, 2006), <http://reporterbrasil.org.br/2006/11/correntes-ganha-premio-de-publico-na-mostra-cine-trabalho/>.

71. On the concept of collective moral damages, see Leonardo Barbosa, Constitutional

labor courts has been initiated, private lawyers (or advocates from a law school legal clinic like the one recently established at the Federal University of Minas Gerais) can also sue for additional damages for an individual client before those same labor courts. The two proceedings can go forward simultaneously.<sup>72</sup> A full description of any individual case must thus build on these archived final inspection reports, combined with any further judicial records. The process of naming the offense as one of the imposition of *trabalho escravo* initially takes place at the level of the inspection report, which may conclude with an administrative consent agreement. It may be affirmed or overturned if the case goes to the labor courts or, much more rarely, to the criminal courts.

## II. THE DIAGNOSTIC PROCESS: WHAT CONSTITUTES “SUBJECTION TO A CONDITION ANALOGOUS TO THAT OF A SLAVE”?

### A. *Identifying trabalho escravo*

In the early inspections carried out in the 1990s in the Amazon region, armed guards, debt peonage, and explicit threats loomed large.<sup>73</sup> An attempted murder of a fleeing worker was at the center of the 1994 case that led to a crucial 2003 settlement with the Inter-American Commission on Human Rights, marking a turning point in the development of Brazil’s national campaign against slave labor.<sup>74</sup> Direct evidence of such tactics, however, became less frequent in subsequent inspection reports—presumably a sign both of better enforcement, and of changing strategies by employers. Although

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Law and the Fight against Contemporary Slavery in Brazil: Putting Property on the Line (Sept. 15, 2014) (unpublished manuscript) (on file with Duke Journal of Constitutional Law and Public Policy).

72. In a small fraction of cases, federal criminal prosecutors have followed up with criminal trials. Convictions in the criminal trial courts, however, are rare. Even fewer cases have made it through the appeals process to a final criminal conviction. For practical purposes a civil conviction in the labor courts will almost always be the last step. For an overview of the situation, see generally Cristiano Paixão & Leonardo Barbosa, *Perspectives on Human Dignity. (On Judicial Rulings Regarding Contemporary Slavery in Brazil)*, QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 44 1167–84 (2015) and Haddad, *supra* note 45. Mariana Armond Dias Paes, of the Law School of the University of São Paulo, is carrying out detailed research on the history of appeals in cases in the federal criminal courts. See Dias Paes, *supra* note 12.

73. On the early years of the “mobile groups,” see GOMES, *supra* note 67, at 211–33 (interviewing Ruth Vilela).

74. See Inter-American Commission on Human Rights, Friendly Settlement, José Pereira, Report No. 95/03. Petition 11.289 (Oct. 24, 2003), <http://cidh.org/annualrep/2003eng/Brazil.11289.htm>.

physical threats were still found to be occurring at some work sites after 2003, recent reports tend to emphasize the role of fear, isolation, lack of information, withheld wages, and psychological pressure in keeping laborers at work in “degrading” conditions.<sup>75</sup>

The 2008 operation titled “Fazenda Cachoeira do Bom Jardim,” also known as “Fazenda Cometa,” in which fifty-eight workers were eventually rescued from a coffee farm in western Minas Gerais, illustrates the shift in focus.<sup>76</sup> The operation was triggered by a denunciation conveyed to the regional branch of the Ministry of Labor by a former worker on the farm.<sup>77</sup> He had reported that the workers, recruited from often distant sites in the states of Maranhão, Piauí, and Bahia, were toiling “without lodging” and that improper deductions had undercut the promised wage rate.<sup>78</sup> He added that he experienced “difficulty leaving the farm.”<sup>79</sup>

The report illuminates the ways in which multiple elements, added together, can be seen to imply the existence of *subjection*, itself a key element of the definition underlying the analogy. The first, and the most frequent in the reports we have analyzed, is the geographical displacement of the workers. In spite of the fact that a separate crime of “domestic human trafficking” (*aliciamento de trabalhadores de um local para outro do território nacional*) has been on the books since 1998, it is still common to find workers being transported within the country illegally, that is, without following applicable regulations, and without providing workers with any means to return home if they subsequently seek to terminate the contract.<sup>80</sup>

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75. See, e.g., MTPS, RF, Empresa Marco Projetos (2013), archived as Op. 143/2013 (describing an inspection carried out in response to a complaint made by one of the workers, who reported poor housing conditions and the occurrence of assaults and death threats suffered by one of the employees, in addition to the presence of a gun and a knife. The labor inspectors confirmed that the complaint was accurate); MTPS, RF, Fazenda Formosa (2011), archived as Op. 081.01/2011 (finding two workers in conditions analogous to slavery based on degrading working conditions in the production of charcoal, as well as the fact that the dwellings were far from the nearest city, with no vehicles in the area, leaving workers geographically isolated); MTPS, RF, Planalto Agroindustrial (2010), archived as Op. 070/2010 (recognizing degrading working conditions based on poor hygienic conditions, psychological pressure, excessive productivity requirements, and a restriction on the workers’ freedom of movement).

76. See MTPS, RF, Fazenda Cometa (2008), archived as Op. 77/2008, 2.) Dados Gerais da Operação [hereinafter Fazenda Cometa].

77. *Id.*

78. *Id.*

79. *Id.* at 4.) Motivação da Ação Fiscal.

80. The crime of enticing workers (*aliciamento*) and transporting them to a different part of the national territory (Art. 207 of the Penal Code) was modified in 1998. The text now clarifies that it is a criminal violation to recruit workers outside the place they will provide their

Inspectors on Fazenda Cometa found that “several co-workers had attempted to leave the worksite, and that one of them only succeeded after collecting small donations from his colleagues.”<sup>81</sup> More than a thousand miles separate the city of Patrocínio, the population center closest to the farm, from the city of Imperatriz, deep in the backlands of the state of Maranhão, from which many workers have been recruited for this kind of highly demanding labor.<sup>82</sup> The trip takes more than 24 hours by bus and the ticket is expensive. Going back home if the work turns out to be very different from what was expected is hardly an option for workers who may not yet have collected any pay.

Compounding the problem of the absolute distance workers have already traveled is the extreme isolation of some of the work sites, which may be located far from the nearest town. The harder it is to reach the farm, the more exposed and vulnerable the workers become, because labor inspection—or indeed oversight by any kind of public authority—is less likely. Fazenda Cometa is separated by twenty-four miles of paved road and six miles of dirt road from the city of Patrocínio.<sup>83</sup> Such a distance—a ten-hour walk—makes quite credible the inspectors’ observation that those who sought to protest the conditions of labor on the farm faced difficulties in leaving the work site.<sup>84</sup> The inspectors in this case acknowledged that there was no direct surveillance of any kind over the workers.<sup>85</sup> However, the circumstances of the farm made it unnecessary to keep armed guards

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services by using deception or advancing them any amount of money. Moreover, it is also a crime to fail to secure conditions for the worker to return to his or her place of origin. For each of these modifications, see Lei No. 9.777, de 29 de dezembro de 1998, D.O.U. de 30.12.1998, 1 (Braz.). In 2016, a statute introduced a specific felony of “human trafficking” (Article n. 149-A), along the lines of the definition adopted by the Palermo Protocol, making it a criminal violation to transport or harbor workers with the intent of subjecting them to slavery or practices similar to slavery. See Lei No. 13.344, de 6 de outubro de 2016, D.O.U. de 7.10.2016, 2 (Braz.). See also LEONARDO SAKAMOTO & XAVIER PLASSAT, MINISTÉRIO DA JUSTIÇA, DESAFIOS PARA UMA POLÍTICA DE ENFRENTAMENTO AO TRÁFICO DE SERES HUMANOS PARA O TRABALHO ESCRAVO 18 (2007) (“Human trafficking is a component of slave labor, practiced mainly in the generally illegal activities of deforestation, and the clearing and maintenance of pastures, as well as in charcoal burning that supplies steel mills and in “modern” agribusiness plantings. . . . States such as Maranhão and Piauí, with low indices of human development, are by far the two largest suppliers of people who are identified and later released from slavery. Extreme poverty generates a contingent reserve of manpower, making the worker disposable.”).

81. Fazenda Cometa, *supra* note 76, at 8.) A Ação Fiscal.

82. *Id.*

83. *Id.* at 9.) Irregularidades encontradas / possível restrição à liberdade de locomoção dos empregados.

84. *Id.*

85. *Id.*

at the gate. Geography itself largely accomplished that purpose.

The conduct of the employer at Fazenda Cometa—particularly through the withholding of personal identity documents—added to the constraints on the workers’ autonomy.<sup>86</sup> The inspectors found twenty-six Labor Cards in the possession of the owner of the farm.<sup>87</sup> Only one had been filled out with the legally required notation concerning the labor contract.<sup>88</sup> The withholding of personal documents is specified in the 2003 update to Article 149 of the Brazilian Penal Code as one of the indicia of labor in conditions analogous to slavery, precisely because when an employer takes control of these documents, he or she creates a substantial burden for the workers.<sup>89</sup> Lack of access to one’s personal Labor Card makes it harder for the worker to unilaterally terminate the contract if confronted with degrading labor conditions.<sup>90</sup> To do so requires obtaining a new Labor Card, and without the proper annotations on the card, the worker has no proof of having actually worked for that employer.<sup>91</sup> Even though a trained lawyer knows that these obstacles can be overcome if a claim is made before a labor court, a worker with little formal education is unlikely to be aware of that possibility. Moreover, the fact that the Labor Cards of the workers from Bahia had already been collected in the hometown of the workers by the same employee in charge of running the farm’s canteen suggests the recruiters’ intent to use the documents as a sort of “collateral” for the initial debt contracted with the employer.<sup>92</sup>

Debt itself can play a crucial role in undermining workers’ autonomy. On Fazenda Cometa, the employee nicknamed “Bó” and the farm manager named Lázaro controlled debts contracted with the canteen.<sup>93</sup> Deductions of the assigned cost of the workers’ meals from their wages were found to exceed the legally permissible threshold.<sup>94</sup>

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86. *Id.* at 9.) Irregularidades encontradas / empregados trabalhando sem o respectivo registro.

87. *Id.*

88. *Id.*

89. *See* Lei No. 10.803, de 11 de Dezembro de 2003, D.O.U. de 12.12.2003, 1 (Braz.).

90. Fazenda Cometa, *supra* note 76, at 9.) Irregularidades encontradas / empregados trabalhando sem o respectivo registro.

91. *Id.*

92. *Id.* at 9.) Irregularidades encontradas / carteiras de trabalho retidas, empregados sem CTPS e empregados sem PIS trabalhando.

93. *Id.* at 9.) Irregularidades encontradas / alimentação precária, água sem condições de potabilidade e descontos indevidos.

94. *Id.*

In addition to selling food, the canteen also sold individual protection equipment (gloves for the harvesting of coffee, for instance), which, by law, should always be provided for the workers directly by the employer.<sup>95</sup> Finally, the records of those debts were kept in the hands of the manager of the farm, such that workers did not have full access to their balance or any control over how much they were being charged.<sup>96</sup> Together, these circumstances could trigger a situation of debt bondage.<sup>97</sup> In this case, however, the inspectors did not claim that full debt bondage existed on this farm, despite evidence they produced that could serve as indicia of an impermissible “truck system” (provision of goods in lieu of monetary remuneration).<sup>98</sup>

Debt of this kind imparts an apparent moral component into the relationship of employer and employee. The withholding of the Labor Card, combined with a truck system operated through a company store, reinforces the psychological coercion exercised over the workers. If they choose to abandon their job because they are unwilling to accept conditions of labor they consider humiliating, they know that the employer still has one of their personal documents in hand. They may well anticipate that he will track them down and intimidate them by attempting to collect the pending debt, and by implying unethical behavior on their part for having left the job. The fear of humiliation before one’s own family can lead to the sense that only if the employer has acknowledged that one is now financially “square” is one fully released from a legal and moral obligation.<sup>99</sup>

In enumerating these factors, the inspectors depicted the situation of the workers they had rescued from Fazenda Cometa as one not just of deplorable physical conditions, but of subjection to degrading conditions of labor.<sup>100</sup> While photographs appended to inspection reports can document the filth and the risk, it is when the dynamic of the relationship is fully described in this way that the imputed

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95. *Id.* See also Decreto-Lei n. 5.452, de 1º de maio de 1943, D.O.U. de 9.8.1943, 11.937; Norma Regulamentadora n. 6, aprovada pela Portaria n. 3.214, de 8 de junho de 1978, D.O.U. de 6.7.1978, 6.2.

96. Fazenda Cometa, *supra* note 76, at 9.) Irregularidades encontradas / alimentação precária, água sem condições de potabilidade e descontos indevidos.

97. *See id.*

98. *Id.* at 9.) Irregularidades encontradas / possível restrição à liberdade de locomoção dos empregados.

99. *See generally* RICARDO REZENDE FIGUEIRA & PISANDO FORA DA PRÓPRIA SOMBRA: A ESCRAVIDÃO POR DÍVIDA NO BRASIL CONTEMPORÂNEO (2004) (demonstrating the importance of workers’ own desire to be seen to be paying their debts).

100. Fazenda Cometa, *supra* note 76, at 9.) Irregularidades encontradas.

element of subjection becomes clear. Poverty and scarcity that might appear on the surface to resemble the workers' own conditions of life in their place of origin take on a different meaning when they are accompanied by constraints on autonomy, magnifying vulnerabilities and compounding disappointment with humiliation and indignity.

An additional element emphasized in some of the reports is the imposition of direct risk to life and health. Many workers on Fazenda Cometa, for example, were found to have no access to individual protection equipment (some were harvesting coffee wearing socks and flip-flops instead of boots, increasing the risk of snake bites).<sup>101</sup> Hygienic conditions were very poor (the "work front" in the field offered no protection from sun and rain during mealtimes, and no portable toilets had been brought to the site).<sup>102</sup> Food was transported, kept, and prepared under inappropriate conditions for those on the work fronts, which could be miles away from the place the workers were lodged.<sup>103</sup> The shelters where the workers were lodged were often dirty, crowded, and in terrible shape.<sup>104</sup> Crucially, there was in some cases no potable water available for the workers at the lodging facilities or at the work fronts.<sup>105</sup>

Confronted with the totality of circumstances on the Fazenda Cometa, the inspection team concluded that:

the withholding of the Labor Cards of the majority of the workers for more than one month without any annotation whatsoever regarding the labor contract, combined with the debt contracted with the manager of the farm, Lázaro, and the employee who ran the canteen, Bó, and with the debilitating workdays and degrading conditions of the work sites and lodging facilities, amount to indicia that the employer has incurred in the violation provided for by Article 149 of the Brazilian Penal Code, the reduction of a person to a condition analogous to that of a slave.<sup>106</sup>

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101. *Id.* at 9.) Irregularidades encontradas / equipamentos de proteção individual.

102. *Id.*

103. *Id.* at 9.) Irregularidades encontradas / inexistência de condições de higiene, conforto e segurança na frente de trabalho.

104. *Id.* at 9.) Irregularidades encontradas / alojamento precário.

105. *Id.* at 9.) Irregularidades encontradas/ água imprópria e insuficiente para consumo humano na frente de trabalho e na área de vivência, 9.) Irregularidades encontradas / alojamento precário.

106. *Id.* at 9.) Irregularidades encontradas / possível restrição à liberdade de locomoção dos empregados.



*B. Discerning something other than trabalho escravo*

On Fazenda Cometa, the imposition of risks that can be viewed as degrading helped to insure an administrative finding of slave labor. On other work sites, however, inspectors held back from such a judgment. To identify the elements making up an operational definition of contemporary slavery as interpreted by the labor inspectors, it is thus useful to examine cases in which an inspection was carried out, but the inspectors concluded that the conditions in question did *not* reach the level for designation as “analogous to slavery.”<sup>107</sup>

On April 3, 2013, for example, after being tipped off by a hotline call, an inspection team moved onto the facilities of Confesta Alimentos Ltda, a bread making company, to verify whether eight Haitians there were being subjected to debilitating workdays and whether their freedom of movement was being constrained.<sup>108</sup> It had been charged that they were living in precarious lodgings and suffering from deprivation of food.<sup>109</sup> It turned out that the company had forty-four employees, seven of whom were indeed Haitians.<sup>110</sup> The inspectors identified improper extensions of the length of the workday, and a breach of the eleven-hour minimum interval between the workdays.<sup>111</sup> They also found that the workers did not have access to a locker room, there was no cafeteria, and the sanitary facilities did not have showers.<sup>112</sup> The inspection team issued twelve notifications for breach of labor law regulations.<sup>113</sup> However, they did not rule that the workers had been subjected to “debilitating workdays,” which could trigger a finding of a condition “analogous to that of a slave.”<sup>114</sup> The administrative violations that had been identified were deemed

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107. Inspections themselves can be triggered in various ways, including information shared with the authorities through a hotline referred to as Disque 100 (“Dial 100”), by administrative complaints made by victims who have fled work sites, by denunciations made by labor unions, or as part of a “plan of action” strategically prepared by the labor inspection teams themselves. See MINISTÉRIO DO TRABALHO E EMPREGO, MANUAL DE COMBATE AO TRABALHO EM CONDIÇÕES ANÁLOGAS ÀS DE ESCRAVO 8 (2011). For the hotline “Disque 100,” see MINISTÉRIO DOS DIREITOS HUMANOS, DISQUE 100- DISQUE DIREITOS HUMANOS, <http://www.sdh.gov.br/disque100/disque-direitos-humanos> (last visited Oct. 28, 2017).

108. See generally MTPS, RF, Confesta Alimentos Ltda. ME (2013), archived as Op. 110/2013.

109. *Id.* at I. Motivação da Ação Fiscal.

110. *Id.* at V. Da Ação Fiscal.

111. *Id.* at VI. Das Irregularidades Trabalhistas e Infrações à Saúde e à Segurança do Trabalho.

112. *Id.*

113. *Id.* at VII. Autos de Infração Lavrados.

114. *Id.*

relatively minor, and “the bad conditions of lodging do not constitute degrading conditions of labor, but mere administrative irregularities.”<sup>115</sup> Importantly, the workers were found to have their papers in order, so the contracts were properly documented.<sup>116</sup>

The formal regularity of the labor contracts seems to have influenced the inspectors’ reluctance to characterize the conditions of labor as analogous to slavery, though such a finding is in theory possible even when the Labor Cards are in order.<sup>117</sup> The existence of properly documented contracts could nonetheless inhibit any effort to “rescue” the workers, a procedure that usually entails administrative cancellation of the labor contracts for a fault on the part of the employer.<sup>118</sup> On a different inspection visit at another site, for example, the team concluded that sixty-two workers were indeed being subjected to “debilitating workdays”—normally an index of slave labor—but they only “rescued” seven of them.<sup>119</sup> All of the others had regular labor contracts, registered in their booklets before the operation took place, and they apparently decided to remain working on the property.<sup>120</sup>

Reports that conclude with a finding that the enterprise has not been engaged in “reduction” of workers to a condition analogous to that of a slave sometimes reflect uncertainty about the allocation of responsibility as between primary employers and contractors. In July of 2012, for example, the Ministry of Labor sent a team to inspect White Martins Gases Industriais Ltda, a charcoal company that was allegedly outsourcing activities to another five companies, in violation of the labor law standards then in effect.<sup>121</sup> The inspection team considered the situation to be one of “illegal outsourcing,” and declared all the 189 workers (who had been hired by the sub-

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115. *Id.*

116. *Id.* at VIII. Manifestação quanto ao Objeto da Denúncia.

117. *See id.*

118. On the usual procedures, see MINISTÉRIO DO TRABALHO E EMPREGO, MANUAL DE COMBATE AO TRABALHO EM CONDIÇÕES ANÁLOGAS ÀS DE ESCRAVO 56–57 (2011).

119. MTPS, RF, Brasil Kirin Logística e Distribuição Ltda (2012), archived as Op. 132/2012, 2. Dos Dados Gerais da Operação.

120. *Id.* at 6. Da Descrição Minuciosa da Ação Fiscal Realizada.

121. MTPS, RF, White Martins Gases Industriais Ltda – Fazenda São Mateus (2012), archived as Op. 47/2012 [hereinafter Fazenda São Mateus]. According to Brazilian law at the time, a company could not outsource its primary activities [*atividades-fim*]. T.S.T., Súmula n. 331 (Contrato de Prestação de Serviços. Legalidade (nova redação do item IV e inseridos os itens V e VI à redação)), 10, Diário Eletrônico da Justiça do Trabalho [D.E.J.T.], 31.05.2011 (Braz.). A statute enacted in 2017, however, now authorizes the outsourcing of primary activities. *See* Lei No. 13.429, de 31 de março de 2017, D.O.U. de 31.3.2017.

contractors to carry out charcoal production) to be in fact employees of White Martins.<sup>122</sup> Some of them did not have formal contracts and others did not have Labor Cards at all.<sup>123</sup>

Charcoal production is widely recognized to be an activity that can be physically debilitating.<sup>124</sup> It requires the worker to toil under extremely high temperatures, amidst smoke and soot, in order to monitor and control the wood burning process. It is common for inspections in charcoal industries to come across circumstances judged to amount to the subjection of workers to debilitating workdays and degrading conditions of labor. However, that was not the judgment made at White Martins.<sup>125</sup> The inspection team noted the absence of sanitary facilities at the work sites; there was no shelter from the weather during the workers' meals; one of the buildings allocated to lodging was uninhabitable, and personal protective equipment was not made available to the workers on regular basis.<sup>126</sup> However, the inspectors noted that toilets were available in the two-table refectory where the workers had their meals.<sup>127</sup> Although the facilities did not meet the legal requirements, the situation was deemed not to be one of complete disregard for norms on the part of the company.<sup>128</sup> There were six concrete barracks with cement floors, provided with beds and hanging lockers, to serve as lodging.<sup>129</sup> The barracks were overcrowded, but in far better condition than the building that was condemned (which was occupied by a small number of workers).<sup>130</sup> Personal protective equipment was furnished to the workers, although the company did not oversee its mandatory use, and some of the protective material was damaged, while other

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122. Fazenda São Mateus, *supra* note 121, at 5. Da Ação Fiscal. 5.1. Do Não Reconhecimento do vínculo empregatício.

123. *Id.* at 5. Da Ação Fiscal. 5.2. Da Contratação de Trabalhadores que não Possuíam Carteira de Trabalho e Previdência Social—CTPS.

124. In addition to the White Martins case file, we examined the Casamassima Indústria file and the Córrego de Saudade file. *See* MTPS, RF, Casamassima Indústria e Comércio Ltda (2006), archived as Op. 079/2006; MTPS, RF, Fazenda Córrego da Saudade (2008), archived as Op. 151/2008, Pt. 1. These cases also involved charcoal production.

125. *See generally* Fazenda São Mateus, *supra* note 121.

126. *Id.* at 5. Da Ação Fiscal. 5.3. Das Irregularidades Relativas às Normas de Segurança e Saúde no Trabalho. 5.3.1. Irregularidades Relativas às Instalações Sanitárias.

127. *Id.* at 5. Da Ação Fiscal. 5.3. Das Irregularidades Relativas às Normas de Segurança e Saúde no Trabalho.

128. *Id.* at 6. Conclusão.

129. *Id.* at 5. Da Ação Fiscal. 5.3. Das Irregularidades Relativas às Normas de Segurança e Saúde no Trabalho. 5.3.3. Irregularidades Relativas aos Alojamentos.

130. *Id.*

materials failed to meet the legal specifications—something the inspectors considered particularly grave.<sup>131</sup>

The case seemed to fall into a middle ground or gray area, one in which the inspectors did not name as *trabalho escravo* the circumstances that they observed, but they could see that the working conditions compounded laborers' vulnerability. All things considered, the team reported that they "did not find, in this inspection, workers subjected to labor in conditions analogous to slavery."<sup>132</sup> However, they asserted that "the situation described amounts to a 'precarization' of work conditions and work environment, demonstrated by the violation of several rules governing labor health and security."<sup>133</sup>

### *C. Inspectors' uncertainties*

The same expression used in the White Martins case—'precarization', implying a particular fragility or precariousness in the work relation—appears in other reports that refrain from issuing a finding of conditions analogous to slavery.<sup>134</sup> It may be that the inspectors use this term to suggest conditions that might tip into those "analogous to slavery," but that for the moment they deem not to have that character. Perhaps uncertain of the prospects of gaining conviction in labor court when the employers appeared at least to have attempted to bring conditions up to code, the inspectors at White Martins seem to have been reaching for an intermediate category, located somewhere between familiar fines for mere labor law violations and the heavy artillery of a charge of subjection to labor in conditions analogous to slavery.

As employers' strategies change, the inspection process itself can become somewhat mismatched to the conditions at hand. The exposure of the egregiously exploitative conditions on Sítio Bom Jesus with which we opened this essay can thus be contrasted with the

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131. *Id.* at 5. Da Ação Fiscal. 5.3. Das Irregularidades Relativas às Normas de Segurança e Saúde no Trabalho. 5.3.5. Irregularidades Relativas à Gestão de Segurança, Saúde e Meio Ambiente de Trabalho Rural.

132. *Id.* at 6. Conclusão.

133. *Id.*

134. *See, e.g.*, MTPS, RF, Anglo American Minério de Ferro Brasil S/A (2014), archived as Op. 037.01/2014; MTPS, RF, CEMIG (2013), archived as Op. 159/2013; MTPS, RF, Teixeira e Sena Ltda (2013), archived as Op. 028.01/2013. Further interviews with labor inspectors themselves may help to illuminate the precise meaning of this term 'precarization,' itself something of a neologism in English, though its cognates in French and Portuguese have become familiar.

repeated, laborious, and inconclusive 2009 inspections of a large operation called LDC Bioenergia, S.A. A total of 286 workers labored on the six separate mechanized cane farms of the company, located near the city of Lagoa da Prata, Minas Gerais.<sup>135</sup> The trigger had been the repeated denunciation of the company for what was characterized as *terceirização ilícita*, a form of then unlawful sub-contracting.<sup>136</sup> The inspectors at LDC Bioenergia were thus not exactly looking for evidence of slave labor, but they were trying to find some way to intervene and allocate responsibility for what were classically bad labor conditions.

It was the Public Ministry of Labor (MPT) that had contacted the Ministry of Labor (MTPS) to initiate an inspection by a mobile team.<sup>137</sup> A large team was assembled: seven inspectors, two prosecutors, and three agents of the Federal Police.<sup>138</sup> Once on the farms, they found that the workers in transport, in the application of herbicides and fertilizer, and in maintenance, were formally employed not by the company but by contractors.<sup>139</sup> After a close examination of the chain of production, the report insisted that these workers were in fact integral to the manufacture of sugar and alcohol that was the core function of the company, and the company should be responsible for compliance with labor norms.<sup>140</sup> The contract workers were, the inspectors argued, in a “precarious” situation, with “pernicious” consequences, exposing them to imminent and serious risks.<sup>141</sup> There

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135. See MTPS, RF, LDC Bioenergia S.A. (2009), archived as Op. 153/2009 (documenting the visits carried out between November 9 and November 20, 2009).

136. The term *terceirização*, invented by a lawyer to rename and re-frame the practice of masking company employees as laborers for a sub-contractor, has its own complex legal history, with several conflicting decisions from the highest labor court on its permissibility. See Magda Barros Biaveschi, *Justiça de Trabalho e Terceirização: Um estudo a partir dos processos judiciais*, in ÂNGELA DE CASTRO GOMES & FERNANDO TEIXEIRA DA SILVA, A JUSTIÇA DO TRABALHO E SUA HISTÓRIA. OS DIREITOS DOS TRABALHADORES NO BRASIL 447–80 (2013). A revised summary of decisions on this topic (a *súmula*) compiled by the Superior Labor Court in 2011 held that only secondary activities of an enterprise could lawfully be subcontracted. See T.S.T., Súmula n. 331 (Contrato de Prestação de Serviços. Legalidade (nova redação do item IV e inseridos os itens V e VI à redação)), 10, D.E.J.T., 31.05.2011 (Braz.). In March of 2017, however, the federal parliament enacted a new statute authorizing subcontracting even of the primary activities of an enterprise. See Lei No. 13.429, de 31 de março de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 31.3.2017 (Braz.).

137. See MTPS, RF, LDC Bioenergia S.A. (2009), archived as Op. 153/2009, 1. Motivação da Ação Fiscal.

138. *Id.* at Equipe de Fiscalização.

139. *Id.* at 6. Atividade Econômica Explorada e Identificação das Empresas Envolvidas.

140. *Id.*

141. *Id.*

had already been two fatal accidents.<sup>142</sup> Drinking water and hygienic facilities were inadequate, and workers had to eat their meals in the field, exposed to sun and rain.<sup>143</sup>

When the time came to enumerate the violations of the labor code, however, the inspectors chose their words carefully. The conditions, they reported, were *no limiar da degradância*, at the border of degradation.<sup>144</sup> The conclusion expressed particular indignation that a company that was part of a well-funded multinational corporation would subject workers to such threats to their physical integrity and lives, “quite close to undermining even human dignity” (“*bastante próxima de atingir inclusive a dignidade humana*”).<sup>145</sup> Although there is little way to be certain of the inspectors’ precise intent, this language seems to signal either a compromise between harsher and more accommodating previous drafts of the report, or a willingness to issue one last warning before accusing a large company of “slave labor,” with the publicity, legal resistance, appeals, and political pressure that such a charge might unleash.

At the same time, it may be that the bad conditions associated with the use of shell or shadow contractors could perhaps not be shown to have been *imposed* by the primary company. The question of demonstrating both responsibility and the imposition of constraint has increasingly become entangled with the use of third-party contracts—a practice whose legality has varied over the years.<sup>146</sup> In the case of the cane farms, the workers seem to have been more or less paid on time, and there were no charges of threats or limits on mobility.<sup>147</sup> Instead, the final citations were for multiple violations of specific labor laws, which when compounded created severe risks to health.<sup>148</sup> It seems that the filthy water and unprotected work sites did indeed evoke what was in other settings treated as “degrading,” but either the relative formality of the work relations, or some uncertainty

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142. *Id.* at 13.2.6. Gestão de Segurança, Saúde e Meio Ambiente de Trabalho Rural.

143. *See id.* at 13.2.1. Fornecimento de Água Potável, em Condições Higiênicas, 13.2.2. Fornecimento de Água Potável e Fresca nos Locais de Trabalho, 13.2.3. Fornecimento de Instalações Sanitárias nas Frentes de Trabalho, 13.2.4. Fornecimento de Abrigos nas Frentes de Trabalho para Proteção contra Intempéries Durante as Refeições.

144. *Id.* at 15. Conclusão.

145. *Id.*

146. *See supra* note 136.

147. *See* MTPS, RF, LDC Bioenergia S.A. (2009), archived as Op. 153/2009. at 13.1.3.1. Atraso no Pagamento de Salário.

148. *See id.* at 13.2.6. Gestão de Segurança, Saúde e Meio Ambiente de Trabalho Rural, 5.1. Autos de Infração Emitidos.

about the allocation of responsibility, held the inspectors back from making the more serious charge.

The reference in the report to human dignity is particularly telling. Although Article 149 of Brazil's Penal Code provides the underlying legal framework for defining labor in conditions analogous to slavery,<sup>149</sup> the guidelines issued in 2011 by the Ministry of Labor distinguish between the criminal law definition and a related but distinct "administrative concept of slave labor," closely tied to the defense of human dignity.<sup>150</sup> The manual for inspectors argues that Brazil's international treaty obligations and human rights commitments impose a responsibility to try to eliminate abusive labor practices, above and beyond those for which there is the full evidence that would be required for an individual criminal prosecution.<sup>151</sup> The concept of "degrading conditions," broadly interpreted, thus opens the possibility for a civil case to be made based on the circumstances of labor and the risks that they entail to the workers' health and safety, rather than on unlawful retention or physical intimidation of the workers. The connecting thread, on this view, is the concept of human dignity, in which the imposition of degrading working conditions is seen as a threat to that dignity.

Similarly, the guidelines provided to prosecutors with the Public Ministry of Labor by the National Coordinating Group on the Eradication of Slave Labor (CONAETE), discussed above, describe as degrading working conditions "those that show disrespect for human dignity by failing to comply with the fundamental rights of the worker . . . and result from a situation of subjection. . . ."<sup>152</sup> Labor in conditions analogous to slavery is then characterized as a "violation of human dignity and of the moral and ethical inheritance of society, entailing both individual and collective moral damages."<sup>153</sup>

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149. See Lei No. 10.803, de 11 de Dezembro de 2003, D.O.U. de 12.12.2003, 1 (Braz.).

150. The comprehensive set of guidelines for inspectors issued November of 2011 by the Ministry of Labor is MINISTÉRIO DO TRABALHO E EMPREGO, *MANUAL DE COMBATE AO TRABALHO EM CONDIÇÕES ANÁLOGAS ÀS DE ESCRAVO* (Brasília, 2011). The term *dignidade* appears repeatedly in that text. See, e.g., *id.* at 10, 12, 13, 15, 17, 25, 79.

151. See generally *id.*

152. See *supra* notes 55, 56; Email from Tiago Muniz Cavalcanti, *supra* note 55.

153. See *id.* at Orientação 05 ("Violação à dignidade da pessoa humana e ao patrimônio ético-moral da sociedade, ensejando danos morais individuais e coletivos. . . ."). See also MINISTÉRIO PÚBLICO DO TRABALHO, *supra* note 56.

*A. Inspectors and prosecutors as authors, writing for a larger public*

Inspectors on the mobile teams seem to be conscious of the divergence between their work and the work of a police investigation that might take place after some other kind of crime.<sup>154</sup> Initially they may measure the height of barracks, photograph the inadequate sanitary facilities, and interrogate the workers about the provision of wages. Once persuaded that the conditions have reached the threshold for the designation “slave labor,” however, inspectors must then turn their *relatórios* into arguments, explaining the how and why of the indignity that they have witnessed. The case files thus become, in effect, hybrids: cool internal records of infractions for the purpose of administrative enforcement, and intentionally affect-laden testimony about the human implications of what is being recorded. Such reports provide not just a portrait of conditions, but a kind of dialogue and argument that seeks to convince the eventual reader that an offense damaging to the entire community has occurred.

As we have examined these archived texts, it has also become clear to us that they were written to be read as public documents, available for consumption by the press and by prosecutors, not just as the record of a completed bureaucratic task.<sup>155</sup> Indeed, communications officers within the two ministries (the MTPS and the MPT) have worked with journalists to call attention to cases, particularly after conviction by the labor courts. Each inspection, trial, and conviction can thus become part of an effort to shape public perception, and to communicate with other potential violators.<sup>156</sup>

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154. See *infra* Appendix for an explanation of the scope of our reading of inspection reports; this inference draws from that reading.

155. Our research has focused on the cases compiled by the Ministry of Labor, now called the Ministry of Labor and Social Security (MTPS). A parallel body of case files produced by the Public Ministry of Labor (MPT) for the 15th region (comprising much of the state of São Paulo) is being assembled and digitized by the faculty and staff associated with the Arquivo Edgard Leuenroth at the State University of Campinas, under the supervision of Prof. Sílvia Hunold Lara of the Department of History. In the case of the *relatórios* from the Public Ministry of Labor, the dossiers sometimes include newspaper clippings and press reports that triggered an inspection, thus folding into the file explicitly activist or journalistic writings. See ARQUIVO EDGARD LEUENROTH, INSTITUTO DE FILOSOFIA E CIÊNCIAS HUMANAS, [http://www.ael.ifch.unicamp.br/site\\_ael/](http://www.ael.ifch.unicamp.br/site_ael/) (last visited Oct. 28, 2017) (describing the project and files).

156. See, e.g., *Empresa é condenada a pagar R\$ 5 milhões por trabalho escravo em MG*, GLOBO (Braz.) (Mar. 24, 2015), <http://g1.globo.com/mg/sul-de-minas/noticia/2015/03/empresa-e-condenada-pagar-r-5-milhoes-por-suposto-trabalho-escravo.html>; see also *Fazendeiro é condenado por manter caseiro em situação de quase escravidão no Vale do Rio Doce*, R7 (Braz.) (May 30, 2014), <http://noticias.r7.com/minas-gerais/fazendeiro-e-condenado-por-manter-caseiro-em-situacao-de-quase-escravidao-no-vale-do-rio-doce-30052014> (reporting a dramatic case from



### B. Formal shaming of violators

If the application of the term “slave labor” to modern circumstances can be a delicate matter, it is at the same time catnip for journalists, who quickly see the appeal of an article built on an official report of slave labor on the farm of an elected official, at the building site of a major construction firm, or in a government-funded airport expansion.<sup>157</sup> Indeed, shaming employers through the press, or through inclusion on an official list of confirmed violators of the law, is part of the larger strategy of the fight against slave labor—to the fury of the companies thus discredited.<sup>158</sup>

The shaming technique can nonetheless bring devastating backlash. After a major construction company was cited on five different occasions over four years for employing slave labor,<sup>159</sup> the trade association of builders (the Associação Brasileira de Incorporadoras Imobiliárias)—whose president owned the construction company in question—responded with a suit to the Supreme Federal Tribunal charging that the government’s *cadastro* (known informally as the *lista suja*, or “dirty list”) was itself unconstitutional.<sup>160</sup> The suit succeeded in obtaining the suspension of official publication of the list, in part on the grounds that stigmatization of this kind was a violation of due process.<sup>161</sup> After this

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the *fazenda* Estrela Dalva in which a worker was unpaid for six years); *MPT encontra 60 trabalhadores em situação análoga à escravidão em MG*, GLOBO (Braz.) (Aug. 12, 2015), <http://g1.globo.com/mg/sul-de-minas/noticia/2015/08/mpt-encontra-60-trabalhadores-em-situacao-analoga-escravidao-em-mg.html> (describing a story of a large “rescue”).

157. See, e.g., Edson Sardinha, *Supremo transforma senador em réu por trabalho escravo*, CONGRESSO EM FOCO (Braz.) (Feb. 24, 2012), <http://congressoemfoco.uol.com.br/noticias/supremo-transforma-senador-em-reu-por-trabalho-escravo/> (describing the 2012 case in which senator João Ribeiro was accused of employing labor in conditions analogous to those of a slave).

158. Companies originally could be placed on the *lista suja* (dirty list) after a completed finding (and after any administrative appeal of the finding) of *trabalho escravo*. See Portaria Interministerial n. 2, de 12 de Maio de 2011, D.O.U. de 13.05.2011. See *infra* Epilogue for subsequent procedural disputes.

159. The construction firm is called MRV, and has been the subject of charges in several states. See MTPS, RF, MRV Engenharia e Participações S.A. (2011), archived as Op. 12/2011; MTPS, RF, MRV Engenharia e Participações S.A. (2011), archived as Op. 36/2011; MTPS, RF, Engenharia e Participações S.A. (2011), archived as Op. 170/2011; MTPS, RF, MRV Engenharia e Participações S.A. (2013), archived as Op. 28/2013; MTPS, RF, MRV-MRL (2014), archived as Op. 118/2014; MTPS, RF, MRV Engenharia e Participações S.A. (2014), archived as Op. 077/2014 (in this final case, the inspection team did not find slave labor).

160. S.T.F., Ação Direta de Inconstitucionalidade No. 5.209, Relator: Min. Cármen Lúcia, 23.12.2014, Diário da Justiça Eletrônico [D.J.e.], 03.02.2015, (Braz.) 18–19 (Preliminary Injunction granted by the Chief Justice of the Court, Ricardo Lewandowski).

161. *Id.* But see *infra* Epilogue for subsequent developments in the case.

victory, the Association of Builders asserted that it remained “absolutely opposed to the use of labor in conditions analogous to slavery” and that it would continue to exert itself to “eliminate” the practice “in all sectors of Brazilian society.”<sup>162</sup>

These rhetorical and political battles now take place in a context in which everyone seems to be aware that a public renunciation and denunciation of labor in conditions analogous to slavery is obligatory. The struggle thus shifts to the question of whether the designation is actually appropriate in any given instance. The 2003 change in the national Penal Code made it easier to specify both the empirical grounds and the dignitary component of the charge, but the presence in the statute itself of verbs connoting the *imposition* of the will of the employer over the worker still leaves room for a continuing debate over culpability. It is perhaps not surprising that this yields endless legal appeals in individual cases, and makes room for the argument that any list of violators is unfair and premature.<sup>163</sup>

### *C. Political crisis and budgetary constraints*

The inspection teams continue to work and write in the shadow of this intense campaign of legal and rhetorical counter-attacks from landholders, construction companies, and their legislative allies. But the very seriousness of the inspections—which can involve long journeys, substantial man- and woman-power, and hours of labor invested in compiling reports and organizing negotiations or prosecutions—reveals the cost to the state of this undertaking. In a time of sharp budget deficits, it is thus not surprising that the national mobile teams had by late 2015 been reduced from nine to three or four.<sup>164</sup> The total number of inspections nationwide has begun to fall accordingly, and seems to show an increasing geographic skew.<sup>165</sup>

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162. The quotation from the association, asserting that they are “. . . veementemente contra o trabalho em condições análogas à escravidão, e continuará envidando todos os seus esforços para sua eliminação completa em todos os setores da sociedade brasileira,” can be found at Ivan Richard, *Proibir Lista Suja “enfraquece” combate ao trabalho escravo, dizem entidades*, EBC (Braz.) (Jan. 28, 2015), <http://www.ebc.com.br/cidadania/2015/01/proibir-lista-suja-enfraquece-combate-ao-trabalho-escravo-dizem-entidades>.

163. See generally Barbosa, *supra* note 12; *infra* Epilogue.

164. See Vitor Nuzzi, *Para auditores, cúpula do ministério tenta enfraquecer fiscalização do trabalho*, REDE BRASIL ATUAL (Braz.) (Feb. 1, 2017), <http://www.redebrasilatual.com.br/cidadania/2017/02/para-sindicato-cupula-do-ministerio-tenta-enfraquecer-fiscalizacao-do-trabalho>.

165. In 2016 there were 115 operations, yielding 81 findings of *trabalho escravo*, affecting 885 workers. MINISTÉRIO DO TRABALHO, RESULTADOS DAS FISCALIZAÇÕES DE COMBATE AO TRABALHO ESCRAVO NO ANO DE 2016, 1, 4 (2016) (on file with the Duke Journal of

The reduction in the capacity for inspection visits reflects a complicated mix of budgetary, political, and ideological factors. Observers also point to adaptations by employers, like those in the charcoal sector who have learned to send laborers to work in short bursts, and then discharge them, leaving little time for a denunciation or an inspection.<sup>166</sup> The president of the Labor Inspectors Union, Carlos Silva, argues bluntly that the attempt to weaken the inspection teams is part of a larger strategy of drastically reducing labor rights in Brazil: “It is not that the demand for inspections has decreased, or that the reports of exploitation have declined, but that we do not have enough personnel to assign to these teams.”<sup>167</sup>

Inspectors and labor prosecutors are to some extent now on their own—and vulnerable—as they try to discern and describe the circumstances and degree of degradation that push labor violations over the line into a threat to human dignity. Whatever uncertainties they have about conditions in a specific instance may now be compounded by the apprehension that making the most serious charge can draw the case into the endless and highly-politicized wrangle over definitions. It is possible that we will see an increase in the future of the kind of cautious language used in a 2008 report concerning a large complex of sugar farms, in which the inspectors concluded that the conditions uncovered there were “liminal”—approaching, almost but not quite, the level of an assault on human dignity. As with the introduction of the term “precarization,” it is difficult to figure out whether it is the conditions themselves that create this hesitation, or the continuing debate over how and whether courts should or will uphold charges that rest on the language of “degrading conditions.”<sup>168</sup>

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Constitutional Law and Public Policy). In the previous year there had been 161 operations, identifying 1,199 workers in conditions of slave labor. See MINISTÉRIO DO TRABALHO, RESULTADOS DAS FISCALIZAÇÕES DE COMBATE AO TRABALHO ESCRAVO NO ANO DE 2016 4, 11 (2016) (on file with the Duke Journal of Constitutional Law and Public Policy).

166. See Clara Velasco & Thiago Reis, *Nº de libertados em trabalho análogo ao escravo cai 34% em 1 ano; total é o menor desde 2000*, GLOBO (Braz.) (Jan. 15, 2017), <http://g1.globo.com/economia/noticia/n-de-libertados-em-trabalho-analogo-ao-escravo-cai-34-em-1-ano-total-e-o-menor-desde-2000.ghtml>.

167. See Vitor Nuzzi, *Para auditores, cúpula do ministério tenta enfraquecer fiscalização do trabalho*, REDE BRASIL ATUAL (Braz.) (Feb. 1, 2017), <http://www.redebrasilatual.com.br/cidadania/2017/02/para-sindicato-cupula-do-ministerio-tenta-enfraquecer-fiscalizacao-do-trabalho>.

168. See, e.g., Fazenda São Mateus, *supra* note 121.

## CONCLUSION

This brings us back to the core question underlying our inquiry. How is the broad analogy that was introduced to the Brazilian penal code decades ago, prohibiting the imposition of labor in a condition like that of a slave, interpreted for the purposes of legal action? The answer seems to lie in recognizing the different levels at which different kinds of concepts operate. The term “slave labor,” in this context, does not refer either to property rights in persons or to the international law definition of slavery as the exercise over a person of “any or all of the powers attaching to the rights of ownership.”<sup>169</sup> It provides instead a specific normative concept, that of behaviors that are no longer permissible as between employer and worker, for they reproduce elements of what was once imposed by masters upon slaves.<sup>170</sup> It is by labeling such behaviors as harms to human dignity that the Brazilian campaign against slave labor gains much of its moral and constitutional warrant, though this level of abstraction has in turn posed a practical and conceptual problem for the inspectors.

In keeping with the general legal principle that conduct must be specified if it is to be made illegal (the legality principle, accompanied by the rule of lenity), much of labor law is composed of rules and corresponding infractions, each with a range of possible penalties. Ordinary judgments can thus be seen as graduated and cumulative. To use the phrase “slave labor,” however, is to break away from those scalar judgments. *Trabalho escravo* is not just one more infraction to be added after many others have been enumerated. It carries an extra weight of moral opprobrium, and requires a yes/no judgment.<sup>171</sup>

The resolution to the tension between these different modes of evaluation lies in the use of intermediate concepts. The 2003 revisions of the penal code offered two criteria that could be closely tied to direct observation: the imposition of debt, and the constraint on

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169. On the definition in international law, see generally ALLAIN, *supra* note 54; STOYANOVA, *supra* note 60.

170. See Ângela de Castro Gomes, *Trabalho análogo a de escravo: construindo um problema*, 11 HISTORIA ORAL 11 (2008), reprinted in Ângela de Castro Gomes, *Labor Analogous to Slavery: The Construction of a Problem*, 1 TRANSLATING THE AMERICAS (Arthur Brakel trans., 2013).

171. Those who are accused of having imposed slave labor are well aware of this moral opprobrium. Senator João Ribeiro, whose case went all the way to the federal Supreme Court, said plaintively, “É muito forte dizer que um cidadão está escravizando alguém.” (“It’s very harsh to say that a citizen is enslaving someone.”) See Edson Sardinha, *Supremo transforma senador em réu por trabalho escravo*, BRASIL DE FATO (Feb. 24, 2012), <http://www.brasildefato.com.br/node/8896>.

movement or departure.<sup>172</sup> More important, it offered two criteria that could function as intermediate concepts, combining observation with normative judgment: debilitating work days, and degrading conditions.<sup>173</sup>

The concept of debilitating work days, which may in part be rooted in the medical literature on fatigue and health, does not, in practice, loom very large in the reports that we have reviewed. Instead, the most important component of post-2003 cases is the category “degrading conditions.” Publicity about cases built on such charges has helped to change the popular image of the phenomenon of slave labor to incorporate what are by now familiar photographs of filthy drinking water drawn from a cattle trough, or black plastic stretched across wooden poles in lieu of lodging. The risks to health from dirty water and pesticides, and the humiliation associated with a lack of toilet facilities, have thus given the normative term “degrading” an observational component. Instead of a stark tension between the subjective and the objective, there has emerged a conceptual framework within which ground-level evidence can be assembled.

At the same time, the tensions and uncertainties that surround this issue have an added emotional and affective component that derives from the use of the word “slave,” whether as adjective or noun. The law invokes by analogy a deeply shameful colonial and national past of slavery, an institution in which the Brazilian state was entirely complicit. The analogy itself can thus become entangled with competing images of the historical as well as the contemporary circumstances. Although the older concept of slaves as property may look in retrospect like a clear-cut instance of “absolute subjection,” to use the phrase from Gilmar Mendes, historians have over the last several decades demonstrated the complex mixture of subjection and agency that lay within even that terrible historical institution.<sup>174</sup> It is thus only fitting that we find labor inspectors and prosecutors today moving back and forth between identifying the larger indignity of subjection, on the one hand, and cataloguing the day-to-day

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172. Lei No. 10.803, de 11 de Dezembro de 2003, D.O.U. de 12.12.2003, 1 (Braz.).

173. *Id.*

174. Gilmar Mendes, Supremo Tribunal Federal, Inquérito n. 2131, 46 23/02/2012 (Braz.). The historical scholarship on Brazilian slavery is vast, and has long circled around these questions of agency and subjection. For a careful survey, see the bibliographic essay by Jean M. Hébrard, translated by Thomas Scott-Railton, *Slavery in Brazil: Brazilian Scholars in the Key Interpretive Debates*, TRANSLATING THE AMERICAS (2013).

conditions of life and labor, on the other, as they seek to reason by analogy with this complex past.

### EPILOGUE

Our understanding of the social dynamics, lived experience, and legal determination of labor in a “condition analogous to that of a slave” has been built up from close readings of inspection reports and judicial decisions, as well as the ethnographic work of anthropologists who study witness testimony and sociologists who analyze shifting forms of labor.<sup>175</sup> In the final months of this project, however, we have become aware of a painful irony: As the accomplishments of the campaign to eradicate slave labor have become clear, and the scholarly analysis has become more refined, the campaign itself has come under increasing threat. Then, in a final twist, the Brazilian state, which has been key to the professionalization of this campaign, was in October of 2016 confronted with a strong judicial condemnation from the Inter-American Court of Human Rights for its failure to fully enforce its own laws and protect its working population.<sup>176</sup>

At the same time, conservative legislators have introduced into the Brazilian Parliament a proposal that would remove the phrases that refer to the act of subjecting workers to “degrading conditions” or “debilitating work days” from the specification of elements of the offense of reducing workers to a condition analogous to that of a slave.<sup>177</sup> The specific target of the proposal is the definition to be used

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175. A special June 2017 issue of the journal *Brésil/s*, edited by Jean M. Hébrard and Rebecca J. Scott, brings together articles on slave labor in Brazil by historians, jurists, sociologists, and anthropologists. See generally 11 BRÉSIL/S (2017), <https://bresils.revues.org/2106>.

176. Caso Trabajadores de la Hacienda Brazil Verde vs. Brasil, Sentencia de 20 Octubre de 2016, Inter-Am. Ct. H.R. (Oct. 20, 2016), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_318\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_318_esp.pdf) [hereinafter *Fazenda Brasil Verde*]. The decision is available online in the original Portuguese and a Spanish translation. For the purposes of this Article, the authors cite the online Portuguese version by section number, followed by the sub-section number and heading name, followed by the next level number and name, and the paragraph number.

177. Senate Bill 432/2013, proposed by a committee led by Romero Jucá (Braz.) (Nov. 11, 2014), <http://www.senado.leg.br/atividade/rotinas/materia/getPDF.asp?t=156295&tp=1>. The legislative progress (or lack thereof) of the initiative from the committee presided over by Jucá, and the suggestions by the rapporteur of the bill in the Committee for Constitutional Matters, can be followed at *Atividade Legislativa*, *Projeto de Lei Do Senado No 432, de 2013* (Braz.), <https://www25.senado.leg.br/web/atividade/materias/-/materia/114895>. A January, 2017, “technical note” from the federal Ministério Público, addressing the definitional question, has been published. See 2a Câmara de Coordenação e Revisão do Ministério Público Federal, *Nota*

in any expropriation proceedings initiated under the recent constitutional amendment. But a dramatic narrowing of the definition of slave labor for future expropriation proceedings could also have a chilling effect on prosecutors in both the labor and the criminal courts.<sup>178</sup>

Even as these legislative developments may make prosecution and conviction more difficult, the IACHR decision issued in October of 2016 criticizes the Brazilian state precisely for its failure to offer adequate judicial remedies.<sup>179</sup> The long-litigated case generally referred to as Fazenda Brasil Verde deals with events on a vast cattle-farm located in Sapucaia, in the southeastern part of the state of Pará, a region infamous for abusive labor conditions.<sup>180</sup> A quick summary of that case, whose final decision has not been published in English, casts light on the past and present entanglement of the processes of inspection, remediation, criminal prosecution, and publication of the names of violators.

Conditions on Fazenda Brasil Verde met the classic descriptive requisites for a characterization as slave labor: unlawful transportation of workers to an isolated work site, withholding of documents and wages, and unacceptable living and working conditions.<sup>181</sup> By 2000, labor inspectors had visited the property on five different occasions (1989, 1993, 1996, 1997, 2000), and the Pastoral Land Commission (CPT) had repeatedly denounced conditions they deemed to constitute enslavement and violations of workers' rights.<sup>182</sup> Workers complained of hunger, constant humiliation, lack of access to medical assistance, and constraint through debt.<sup>183</sup> Following reports of the disappearance of two workers, Federal Police visited the farm in 1989, but no effective measures followed.<sup>184</sup> In 1992 the Pastoral

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*tecnica 2CCR/MPF N. 1, de 20 de janeiro de 2017* (Braz.) (Jan. 20, 2017), <http://www.mpf.mp.br/pgr/documentos/nota-tecnica-conceito-trabalho-escravo>.

178. *Id.* Meanwhile, at least one state legislature (Minas Gerais) has formally petitioned the Senate to refrain from weakening the legislation, in order that there not be backsliding in the "social rights that are constitutionally guaranteed." See Sargento Rodrigues, Deputy to Senhor Presidente da Assembleia Legislativa do Estado de Minas Gerais, Address on Requerimento 1109/2015 (May 26, 2015) (on file with authors) ("...prevenindo-se, assim, a ocorrência de retrocesso de direitos sociais garantidos constitucionalmente").

179. See generally *Fazenda Brasil Verde*, *supra* note 176.

180. *Id.*

181. *Id.* at VI. Fatos, A. Contexto, A.2. Características do Trabalho Escravo no Brasil, ¶ 112.

182. *Id.*

183. *Id.* at VI. Fatos, A. Contexto, A.2. Antecedentes, ¶¶ 128–52.

184. *Id.*

Land Commission filed a complaint requesting that the PGR (Procuradoria-Geral da República) investigate the reports of abuse.<sup>185</sup> Despite the abundant evidence of threats and armed surveillance, the official position of the police was that they had not discovered conditions of slave labor in their inspection.<sup>186</sup> A labor inspection conducted on the farm between late June and early July of 1993 also did not issue a finding of slave labor.<sup>187</sup>

In 1994, a public prosecutor (Subprocurador Geral da República) wrote to the Pastoral Land Commission analyzing the inspection reports, and criticizing the fact that the police had failed to record the testimony and observations of the workers on site.<sup>188</sup> A lack of direct evidence and the passage of time since the events nonetheless yielded a legal ruling of prescription, blocking criminal proceedings against the owner. In 1997, however, two workers reported to the police they had been subjected to slave labor on the farm, and had subsequently escaped.<sup>189</sup> This led to further inspection in April 1997, and to criminal prosecution of the owner of the farm (Quagliano Neto), the labor recruiter (Raimundo Alves da Rocha), and the manager (Antônio Alves Vieira).<sup>190</sup>

In addition to criminal proceedings, new administrative inspections were conducted in 1997.<sup>191</sup> In 1998, the Regional Office of the Public Ministry of Labor (MPT /DRT) reported that the conditions on the farm had experienced a “considerable improvement.”<sup>192</sup> Criminal prosecution, moreover, eventually proved unsuccessful due to the operation of Brazil’s general rules on prescription.<sup>193</sup>

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185. *Id.* at VI. Fatos, B. Fatos Dentro da Competência Temporal da Corte, B.3. A Visita à Fazenda Brasil Verde em 2000, ¶¶ 162–74.

186. *Id.*

187. *Id.* at VI. Fatos, A. Contexto, A.5. Antecedentes, ¶ 130.

188. *Id.* at VI. Fatos, A. Contexto, A.5. Antecedentes, ¶¶ 136–38.

189. *Id.*

190. *Id.*

191. *Id.* at VI. Fatos, A. Contexto, A.5. Antecedentes, ¶ 140.

192. *Id.*

193. *Id.* at VI. Fatos, A. Contexto, A.5. Antecedentes, ¶ 152, 161. Under Brazilian law, the length of the time following the alleged crime after which a conviction can no longer be sought depends on the maximum term of imprisonment applicable to each crime, which in the case of Article 149 is 8 years, or more if there are specific circumstances such as an adolescent victim or multiple victims. *See* Article 109 of Decreto-Lei No. 2.848, de 7 de Dezembro de 1940, Diário Oficial da União [D.O.U.] de 31.12.1940, 23911 (Braz.). The general rule holds even if prosecution has already commenced, or if an initial conviction is under appeal. *Id.* After twelve years, for example, a crime with a potential sentence of 8 years can no longer continue to be pursued. *Id.*



In 2000 the labor inspection team paid another visit to the farm, following a new denunciation by two workers who had fled the farm in the first week of March, 2000.<sup>194</sup> Their description of the circumstances of their departure evoked the continued intense brutality of the treatment of laborers.<sup>195</sup> Ill with fever and unable to work, they had been bullied and beaten.<sup>196</sup> Security guards had threatened to tie them up for the next two weeks, or kill them on the spot.<sup>197</sup>

After fleeing through the forest, the workers had sought the help of the local office of the Pastoral Land Commission.<sup>198</sup> A report from the Commission triggered the new inspection on the farm on March 15, 2000.<sup>199</sup> Some eighty workers were on the farm at the time the inspection team arrived.<sup>200</sup> Inspectors found armed guards as well as evidence that workers' documents were being withheld and that workers had been obliged to sign blank documents.<sup>201</sup> The toilets were in a deplorable condition and workers were sheltered in improvised barracks with black plastic sheeting as the only roof.<sup>202</sup> The inspectors reported that there were no beds, no lockers, and no electricity.<sup>203</sup> Food was scarce or spoiled, and potable water was lacking.<sup>204</sup> There was evidence of debt bondage and an absence of medical assistance; several labor-related injuries were recorded.<sup>205</sup> The workdays were judged to be debilitating: Workers were roused at 3AM to walk to the work site, and obliged to work from 6AM to 6PM, with only one 30-minute lunch break.<sup>206</sup> Respite came only on Sundays.<sup>207</sup> The

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194. Fazenda Brasil Verde, *supra* note 176, at VI. Fatos, A. Contexo, A.5. Antecedentes, ¶ 145.

195. *Id.* at VI. Fatos, A. Contexo, A.5. Antecedentes, ¶¶ 151–52.

196. *Id.*

197. *Id.* at VI. Fatos, B. Fatos Dentro da Competência Temporal da Corte, B.3. A Visita à Fazenda Brasil Verde em 2000, ¶ 174.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at VI. Fatos, B. Fatos Dentro da Competência Temporal da Corte, B.3. A Visita à Fazenda Brasil Verde em 2000, ¶ 175.

202. *Id.* at VI. Fatos, B. Fatos Dentro da Competência Temporal da Corte, B.3. A Visita à Fazenda Brasil Verde em 2000, ¶¶ 177–78.

203. *Id.*

204. *Id.*

205. *Id.* at VI. Fatos, B. Fatos Dentro da Competência Temporal da Corte, B.3. A Visita à Fazenda Brasil Verde em 2000, ¶¶ 166–72.

206. *Id.*

207. *Id.*

descriptions, in effect, conveyed an encyclopedia of the modes of imposition of a condition “analogous to that of a slave.”

Labor proceedings and criminal prosecution were again initiated. In the labor law proceedings, a settlement was reached regarding the conduct of the company towards the workers.<sup>208</sup> An inspection in May 2002 found the Quagliato group to be fulfilling the terms of the agreement.<sup>209</sup> On the criminal side, the federal prosecutor presented charges against the owner of the farm, the labor recruiter (the *gato*), and the manager.<sup>210</sup> Initially, however, the federal court ruled that state courts, not federal, were the ones with the authority to hear such cases.<sup>211</sup> So the Brasil Verde criminal prosecution was referred to the state court, where it simply disappeared.<sup>212</sup> Vanished.

Faced with this devastating record, the Inter-American Court of Human Rights found Brazil guilty of violations of the right not to be subjected to slavery or human trafficking,<sup>213</sup> as formalized in the 1969 American Convention on Human Rights.<sup>214</sup> At issue was not only the treatment of the more than eighty individual workers rescued by the inspection team in 2000, but also a pattern of “discriminação estrutural histórica, em razão da posição econômica” (historic structural discrimination, due to the economic position of the workers).<sup>215</sup>

The court also found Brazil guilty of violating the right to due judicial protection, as established in the American Convention on Human Rights.<sup>216</sup> This was based both on a breach of the Article 8.1, the right to a fair trial,<sup>217</sup> and on a breach of Article 25, the right of

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. The Supreme Federal Tribunal, ruling in a different case that came before it in 2006, settled the jurisdictional question, granting jurisdiction in cases of *trabalho escravo* to the federal courts. The publication of this decision, however, was delayed for two years. See Brasil. Supremo Tribunal Federal. Recurso Extraordinário n. 398.041-6/PA. Recorrente: Ministério Público Federal. Recorrido: Sílvia Caetano de Almeida. Relator: Ministro Joaquim Barbosa. Brasília, DF, Diário Oficial da Justiça Eletrônico [D.J.T.E.] 19.12.2008.

213. See Fazenda Brasil Verde, *supra* note 176, at VI. Fatos, B. Fatos Dentro da Competência Temporal da Corte, B.4. O Procedimento realizado pelo Ministério do Trabalho relativo à visita de 2000, ¶¶ 179–81.

214. American Convention on Human Rights, Inter-Am. Comm’n H.R., art. 6.1 (Nov. 22, 1969) [hereinafter ACHR].

215. See Fazenda Brasil Verde, *supra* note 176, at VI. Fatos Dentro da Competência Temporal da Corte, B.5 Processo Penal a Respeito da Fiscalização de 2000, ¶ 185.

216. *Id.*

217. See ACHR, *supra* note 214, art. 8.1 (“to a hearing, with due guarantees and within a

access to legal recourse.<sup>218</sup> In effect, the Court seems to have recognized that the operation of Brazilian rules of criminal procedure, combined with local politics, had led to a situation in which for most employers the risk of criminal conviction for violation of the relevant article of the penal code was close to zero.<sup>219</sup>

In the final analysis, the decision of the Inter-American Court highlighted the dynamics and continuing danger of *trabalho escravo*. The legal solution suggested by the court, however, would seem to require the legislature to modify deep-seated general procedural rules about prescription, an outcome that appears unlikely. For the foreseeable future, final convictions on criminal charges of the imposition of labor in conditions analogous to slavery are likely to remain few and far between.

The decision of the Inter-American Court brings us to a final fast-evolving development in the struggle over enforcement. The compiling and publication of the government-authorized list of individuals and companies that have been found to be using *trabalho escravo* has drawn intense legal fire, with its opponents invoking rights to privacy, self-defense, and the presumption of innocence.<sup>220</sup> These arguments have in turn been forcefully countered by the Public Ministry of Labor, which has pointed out that the list encompasses only those who have been convicted in public administrative proceedings, in which defendants have had the right to present evidence, and thus represents information that is already public.<sup>221</sup> In the course of its Fazenda Verde decision, the Inter-American Court also criticized the actions that had led to the withholding of

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reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”).

218. See *id.* at art 25.1 (“simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights.”).

219. The court did acquit the Brazilian state of the charge of violations against life, integrity, individual freedom and judicial protection of the workers Luis Ferreira da Cruz and Iron Canuto da Silva, the two men who had been reported missing back in 1989. See Fazenda Brasil Verde, *supra* note 176, at X. Pontos Resolutivos, ¶ 508.

220. S.T.F., Ação Direta de Inconstitucionalidade No. 5.209, Relator: Min. Cármen Lúcia, 23.12.2014, Diário da Justiça Eletrônico [D.J.e.], 03.02.2015, (Braz.) 18–19 (Preliminary Injunction granted by the Chief Justice of the Court, Ricardo Lewandowski).

221. On counter-arguments from the MPT, see *Para MPT, decisão de Ives que acaba com lista suja de trabalho escravo é “lamentável,”* JUSTIFICANDO (Braz.) (Mar. 8, 2017), <http://justificando.cartacapital.com.br/2017/03/08/para-mpt-decisao-de-ives-que-acaba-com-lista-suja-de-trabalho-escravo-e-lamentavel/>. Formal statements and legal reasoning from the MPT as the debate unfolds can be found in the Notícias section of the Ministry’s website: Notícias, MINISTÉRIO PÚBLICO DO TRABALHO, [www.mpt.gov.br/](http://www.mpt.gov.br/) (last visited Oct. 28, 2017).

publication of the “dirty list,” deeming these to be a backlash against the campaign to eliminate practices analogous to slavery.<sup>222</sup>

The bitterness of this debate, which has set ministries and judicial branches against each other in a dizzying sequence of rulings and appeals, might be read as a measure of the success of the *lista suja* in stigmatizing those who violate the labor laws. In a recent episode of this executive and judicial quarrel, Michel Temer’s government – under the pretext of re-evaluating the premises of the list – decided to withhold it from the public eye until (at least) the middle of 2017.<sup>223</sup> This decision was challenged in labor courts, which ordered the government to make the list public.<sup>224</sup> The president of the Superior Labor Court, however, suspended this decision in early March, 2017.<sup>225</sup> Then, less than a week later, a special panel of the Court revoked the president’s decision, reestablishing the order to publicize the list, of which a version was issued in March and updated in October, 2017.<sup>226</sup>

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222. Fazenda Brasil Verde, *supra* note 176, at IX. Reparações, C. Medidas de Satisfação e Garantias de Não Repetição, C.5. Garantia de Não Repetição: Políticas Públicas, ¶469. The “Ação Direta de Inconstitucionalidade” declaring the publication of the *lista suja* to be unconstitutional, to which the ACHR decision refers, although in place at the time of the complaint, had been dismissed by the Brazilian Supreme Court in May 2016, and the order revoked. On her last day in office, President Dilma Rousseff replaced the Portaria regulating the “lista suja,” creating a formal argument that allowed the Court to dismiss the lawsuit based on the “perda superveniente de objeto” (i.e. the challenged norm was no longer in place). On the request for an order of unconstitutionality, and its rejection, see Ação Direta de Inconstitucionalidade. Portaria Interministerial N. 2/2011. Cadastro de Empregadores que Tenham Submetido Trabalhadores a Condições Análogas à de Escravo. Ato Normativo Revogado. Perda Superveniente de Objeto. Ação Direta De Inconstitucionalidade Julgado Prejudicada, ADI 5209/DF (Braz.) (May 16, 2016), <http://www.migalhas.com.br/arquivos/2016/5/art20160530-05.pdf>.

223. In December 2016 the Ministry of Labor created a working group charged with reforming the rules governing the “dirty list,” and gave the group four months from February 2017 to conclude its work. See Portaria No. 1.429, de 16 de dezembro de 2016, DIÁRIO OFICIAL DA UNIÃO, Seção II [D.O.U.2] de 19.12.2016, 135. For the deadline, see Portaria n. 182, de 22 de fevereiro de 2017, DIÁRIO OFICIAL DA UNIÃO, Seção II [D.O.U.2] de 23.02.2017, 48.

224. T.R.T.10. Ação Civil Pública n. 0001704-55.2016.5.10.0011, Relator: Juiz Rubens Curado Silveira, 19.12.2016 (on file with Duke Journal of Constitutional Law and Public Policy).

225. T.S.T. Processo n. TST-SLAT-3051-04.2017.5.00.0000, Presidente: Ministro Ives Gandra da Silva Martins Filho, 07.03.2017, 3, D.J.T.E., 08.03.2017.

226. T.S.T. Processo n. TST-MS-3351- 63.2017.5.00.0000, Relator: Ministro Alberto Luiz Bresciani de Fontan Pereira, 14.03.2017, 162, D.J.T.E., 14.03.2017. As we go to press, the 2017 list remains accessible from Brazilian IP addresses at the Ministry of Labor website: MINISTÉRIO DO TRABALHO E PREVIDÊNCIA SOCIAL, <http://trabalho.gov.br/> (last visited November 1, 2017). From non-Brazilian IP addresses, information on the *lista suja* can be obtained on the blog of Leonardo Sakamoto UOL: BLOG DO SAKAMOTO, including a news item announcing the March issuance of the list. See <https://blogdosakamoto.blogosfera.uol.com.br/2017/03/23/ministerio-do-trabalho-volta-a-publicar-lista-suja-do-trabalho-escravo/>.

We close by taking heart from the controversy over publication of the list of enterprises and individuals found to have violated the law. The inspection teams whose labor generated the remarkable *relatórios* we have studied are now being subjected to budget cuts and political pressure. But the intense elite opposition to the publication of the names of companies found to be violators provides a measure of the threat to “brands” that publicity about those inspections represents. Employers’ fear of publication reflects an awareness of a widening social repudiation of the underlying labor practices. Even if much of the central government is now backing away from elements of the national campaign, the Public Ministry of Labor is mounting a strong defense of the regulatory and inspection regime on which the campaign has rested.<sup>227</sup> Moreover, that campaign has over the last decades helped to build a public understanding that labor in conditions analogous to slavery persists, can be named and documented, and is both unlawful and socially impermissible.

Social stigma will not, of course, directly prevent illegal exploitation of workers, particularly if perpetrators retain a degree of impunity in the criminal courts. But the legacy of the campaign, along with the continuing actions of inspectors in states like Minas Gerais that provide funding and leadership, may make it possible to sustain complementary private tools of public information and concerted legal action against *trabalho escravo*, even in the face of official retrenchment.<sup>228</sup> Moreover, in compiling their reports and taking cases to the labor courts, the inspectors from the Ministry of Labor and the prosecutors from the Public Ministry of Labor have effectively multiplied what might be thought of as the available sources of law, giving concrete form to the underlying normative judgments on which the campaign has rested. Narrowing the analogy with historical slavery to focus on labor relations, they have identified, catalogued, and named as *trabalho escravo* key sets of behaviors in

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227. See *supra* note 221, and more recently the issuance of a dramatic restriction of definitions in the executive order Portaria No. 1.129, de 13 de outubro de 2017, Diário Oficial da União, Seção I [D.O.U.] de 16.10.2017, 82, followed by a fierce rebuttal from the MPT in Ministério Público da União (Ministério Público Federal & Ministério Público do Trabalho). Recomendação No. 38/2017-AA, ref. Procedimento No. 1.16.000.003172/2017-76 (Braz.) (Oct. 17, 2017), <https://pt.calameo.com/read/004792140c18ee200d39a>.

228. See, e.g., the innovative large-scale educational project titled “Escravo, Nem Pensar!” organized by the civil society organization Repórter Brasil. Escravo, Nem Pensar, REPÓRTER BRASIL, <http://escravonempensar.org.br/>.

contemporary Brazil that unlawfully reproduce elements of the indignities once imposed by masters upon slaves.

## APPENDIX. NOTE ON SOURCES

The full digital files of these *relatórios* held in the archives of the Ministry of Labor and Social Security (MTPS) have graciously been made available to the authors for the purposes of the present research. It is our understanding that these are public documents, although they are not easily accessible to the public. We have used the names of employers when they appear on the title of the individual report, and are thus already subject to inclusion in public compilations and summary reports. Out of respect for the privacy of individuals, however, we generally refer to managerial personnel only by first name or nickname, unless they were later criminally indicted, and we do not use the names of individual workers whose testimony and personal data are sometimes included in the *relatórios*. The workers themselves were not the targets of the investigations, and it would be appropriate to seek their consent before citing their words.

We have focused our attention on reports from the state of Minas Gerais, both because of its importance and because of the specific legal experience of two of the authors. (Leonardo Barbosa attended law school there and worked for several years on human rights issues in the state; Carlos Haddad sits on the federal bench there and teaches in the law school of the Federal University of Minas Gerais.) Our system for citing the files (the *Relatórios Fiscais*) is based on the titles on the cover page, and the internal system of classification used for the reports, which were archived by date and the number of the operation, e.g. Op. 014/ 2004.